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No. 20,599

**United States Court of Appeals
For the Ninth Circuit**

HENSLEY EQUIPMENT COMPANY, INC.,

Appellant,

vs.

ESCO CORPORATION,

Appellee.

APPELLANT'S BRIEF

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No. 20,599

United States Court of Appeals For the Ninth Circuit

HENSLEY EQUIPMENT COMPANY, INC.,	}
<i>Appellant,</i>	
VS.	
ESCO CORPORATION,	}
<i>Appellee.</i>	

APPELLANT'S BRIEF

Appellant, Hensley Equipment Company, Inc., files this brief in support of its appeal from a judgment of the United States District Court for the Northern District of California, Southern Division. The district court found that appellant infringes United States Letters Patent No. 2,483,032, issued to Josef Baer, on September 27, 1949 for an Excavating Tooth. As a matter of convenience, appellant, Hensley Equipment Company, Inc., is referred to in this brief as "Hensley"; and appellee, Esco Corporation, is referred to as "Esco". The record on this appeal has been prepared under amended Rule 10 of this Court. References to the record will be indicated herein by the designation (Clk. Tr.....) in reference to the clerk's transcript and (Rep. Tr.) in reference to the reporter's transcript of the trial.

JURISDICTIONAL STATEMENT

Jurisdiction of the district court was based upon 35 U.S.C. §281 (1952) and 28 U.S.C. §1338 (1948).

The Complaint and Amended Complaint seek relief under the patent laws of the United States (Clk. Tr. 1, 2, 15, 16).

Jurisdiction of this court over the appeal from the judgment is based upon 28 U.S.C. §1292(a) (1) and (4) (1948). The judgment of the district court grants an injunction and is final except for accounting (Clk. Tr. 520A-520C).

This appeal is timely prosecuted under 28 U.S.C. §2107 (1948). The judgment appealed from was entered on September 27, 1965 (Clk. Tr. 520A-520C) and the Notice of Appeal was filed on October 25, 1965 (Clk. Tr. 520).

STATEMENT OF THE CASE

A. The Parties.

Esco is an Oregon corporation, located in Portland, Oregon, whose business includes the manufacture and sale of expendable products for construction equipment, such products including excavating teeth (Rep. Tr. 44, 44A).

Hensley, at the time of the proceedings in the district court, was a California corporation, located in San Leandro, California. Since that time, Hensley has moved from California and is now located in Dallas, Texas. Hensley's business also includes the manufacture and sale of expendable parts for construction equipment, including

excavating teeth and replacement wear-points for those teeth (Rep. Tr. 308, 309).

B. Subject Matter of the Suit.

The subject matter of the Baer patent No. 2,483,032, in suit (Pl. Ex. 2—hereinafter referred to simply as the Baer patent) is excavating teeth. Excavating teeth are devices which fit upon the front or cutting edges of dippers, shovel buckets and the like, and serve to break up the earth or rock in which the equipment is working (Rep. Tr. 47).

The particular excavating teeth of concern in this suit have two parts—an adaptor and a wear-point. The adaptor is shown in the Baer patent at Figure 7 and is also designated by the reference numeral 20 in Figures 1 and 2. This adaptor fits upon the lip of a dipper bucket, or the like. The wear-point is shown in the Baer patent at Figure 6 and is also designated by the reference numeral 42 in Figures 1 and 2. The wear-point fits upon the adaptor and provides the actual cutting edge of the overall tooth. The overall tooth, including the wear-point and the adaptor, is shown in Figures 1 and 2 of the Baer patent. During the trial, Esco offered a small plastic model (Pl. Ex. 1) and Hensley offered a lightweight wooden model (Def. Ex. FF) for the purpose of illustrating the actual tooth. These models will be beneficial here for the same purpose.

C. The Prior Art.

For consistency in discussing the prior art, the above and related terms will be used in a consistent manner

despite a wide discrepancy in the terminology in the prior art patents themselves and in the industry in general.

1. The Thomas Patent—No. 915,809.

On October 30, 1908, Valentine C. Thomas filed an application for United States patent on a Dipper Tooth. Thomas's tooth was of the two part variety including an adaptor, designated by the reference numeral 10 in his patent (Def. Ex. N, Fig. 2) together with a wear-point as shown in Figures 2, 3, 4 and 5 (Rep. Tr. 413).

In the Thomas patent the adaptor 10 included a nose portion which, as can be seen in Figures 1 and 3, is generally wedge shaped. The wear-point itself of the Thomas patent includes a socket shaped to conform with and fit upon the nose 15 of the adaptor (Rep. Tr. 413).

Thomas's application issued into patent No. 915,809 on March 23, 1909.

2. The McKee Patent—No. 1,780,397.

On August 29, 1928, Walter S. McKee and Eugene C. Bauer filed an application for patent on a Dipper Tooth. McKee's dipper tooth was also of the two part variety including an adaptor and a wear-point. The adaptor is designated by the reference numeral 4 in Figures 1 through 4 of his patent (Def. Ex. AA) and also as shown separately in Figure 6. The wear-point is designated by the reference numeral 5 in the various figures and is shown separately in Figure 7. In McKee, the wear-point includes a socket 21 formed by the jaws 17 shown in Figures 7 and 8. The jaws 17 "fit against the diverging sides of the nose 7" of the adaptor (Def. Ex. AA, p. 2,

ll. 7, 8) as seen particularly in Figures 3 and 8. The rearward portion of the wear-point, at the back of the jaws 17, is spaced from the forward portion of the adaptor adjacent the jaws 17 (Rep. Tr. 502).

The McKee patent issued on November 4, 1930.

3. The Mekeel Patents.

a. The First Mekeel Patent—No. 1,845,677.

On March 9, 1929, Van Cortright Mekeel filed an application for patent for a Digging Tooth. In this particular patent (Def. Ex. BB) two embodiments of a tooth are shown, both of which are of the two part variety. In the first embodiment, shown in Figures 1 to 6, the two part tooth includes an adaptor 12 formed with a socket 15, together with a wear-point 13, formed with a shank 14 to fit into the socket of the adaptor.

In the second embodiment, shown in Figures 7 through 10, the two part tooth includes an adaptor designated by reference numeral 12a including a forwardly extending nose portion designated by the reference numeral 14a. The adaptor is shown separately in Figure 9 and the wear-point in Figure 8. The wear-point is shown mounted on the adaptor in Figures 7 and 10 (Rep. Tr. 471).

In this second embodiment of the Mekeel patent (Def. Ex. BB), the upper and lower faces of the nose 14a converge to form a truncated wedge and, as apparent from Figure 8, the socket of the point is also wedge shaped. At the joint between the rear of the wear-point and the forward shoulder of the adaptor, there is a tongue and recess configuration shown principally in Figure 7. As shown, the wear-point has recesses 24 while the adaptor

includes tongues 23. As can be seen from the drawings (particularly Figures 7 and 9) upper and lower edges of the tongue and recess are parallel not only to each other but also to the upper wedge face of the adaptor nose (Rep. Tr. 472, 473, 475). As can be seen in Figure 10, there is a space between the adaptor and the wear-point at the vertex of the socket (Rep. Tr. 474).

Mekeel patent No. 1,845,677 (Def. Ex. BB) issued on February 16, 1932, and for convenience, will be referred to herein simply as the Mekeel '677 patent. During the trial, Hensley offered a lightweight wooden model (Def. Ex. KK) of the structure shown in Mekeel '677 patent for purposes of illustration. The model will be beneficial here for the same purpose.

b. The Second Mekeel Patent—No. 1,951,988.

On December 30, 1931, prior to the issuance of his '677 patent (Def. Ex. BB), Mr. Mekeel filed another patent application for a Digger Tooth. This second patent (Def. Ex. QQ) is directed to a tooth, as stated by Mekeel:

“of the kind described in my pending application Serial Number 345,719 filed March 9th, 1929 now Patent No. 1,845,677 [Def. Ex. BB];—that is to say, it is a digging tooth including a part having a socket and a part having a slotted tenon engaged in said socket with means for expanding the tenon in the socket to lock the two parts together.” (Def. Ex. QQ, p. 1, ll. 7-14)

In his second patent, Mekeel stressed the spacing between the wear-point and the adaptor (Rep. Tr. 495), stating that the reason for the spacing is so that:

“any wear on the contacting parts will be taken up and compensated for by further driving the [point] . . . towards the [adapter] . . . with no possibility of the shoulders 20 or the ends of the projections 18 engaging and thereby limiting that movement.”

(Def. Ex. QQ, p. 1, ll. 93-98)

This second Mekeel patent, No. 1,951,988 (Def. Ex. QQ) was issued March 20, 1934, and for convenience is referred to herein simply as the Mekeel '988 patent.

4. The Seal Patent—No. 2,134,344.

On May 21, 1937, Stanley Seal filed a patent application for a Dipper Shovel Tooth. This patent (Def. Ex. R) also relates to a two part tooth including an adaptor lettered B and a wear-point numbered 23 (Rep. Tr. 414). As can be seen in Figures 1 and 2 of the Seal patent, the wear-point has a wedge shaped socket 25 adapted to engage the wedge shaped nose 27 of the adaptor. In this instance, the wear-point includes rearwardly projecting wedge shaped tongues 24 which fit into and “interlock with recesses 28 in opposite sides of the [adaptor]. . . .” (Def. Ex. R, p. 1, col. 2, ll. 48, 49) (Rep. Tr. 414, 415).

The Seal patent issued October 25, 1938.

5. The Hosmer Patent—No. 2,251,487.

On April 17, 1939, Chester C. Hosmer and Ernie L. Launder filed an application for patent on a Tooth Point. Here again the patent (Def. Ex. S) is for a point of the two part variety including an adaptor numbered 10 in the drawings and a wear-point. Here again the wear-point includes a generally wedge shaped socket to cooperate with a wedge shaped nose 13 on the adaptor. In this patent, as

is apparent from Figures 2 and 3, the upper wall or spike 22 of the wear-point is considerably heavier than the side and bottom portions 28 and 29 (Rep. Tr. 506).

The Hosmer patent issued August 5, 1941.

6. The Crawford Patent—No. 2,312,802.

After filing applications for two earlier patents (Def. Exs. T and U) Arthur N. Crawford filed, on January 31, 1942, an additional patent application for a Locking Device for Bucket Teeth. This later patent (Def. Ex. V) shows another tooth of the two-part variety including an adaptor and wear-point. Here again the wear-point includes a wedge shaped socket adapted to engage the wedge shaped nose of the adaptor. The wear-point includes a "heavy, plate-like blade" (Def. Ex. V, p. 1, col. 2, ll. 25, 26).

As can be seen in Figure 3 of the Crawford patent (Def. Ex. V) there is a space between the rearward edge of the wear-point and the forward edge of the adaptor, adjacent to shoulder 3. Also, there is a space between the adaptor and the wear-point at the vertex of the nose 2 and socket (Def. Ex. V, Fig. 3). A pin 17 is used to join the wear-point to the adaptor and the pin is held in place by means of a resilient member or spring 15.

In the Crawford patent, the spring 15 and the spacing between adaptor and wear-point cooperate to allow for wear between the parts. As stated by Crawford:

"[i]f, during subsequent digging operations, the [wear-point] . . . should become loose on [the adaptor] . . . the strong spring being already compressed will exert sufficient force to advance the pawl

[numbered 13 in Figure 1] against tongue 12 so as to take up all lost motion”.

(Def. Ex. V, p. 2, col. 1, ll. 41-46)

The Crawford patent issued March 2, 1943.

7. The British Patent—No. 565,417.

On June 5, 1942, Aktiebolaget Bofors filed a patent application in Sweden and on May 6, 1943, a corresponding application was filed in the United Kingdom. This latter application issued as British Patent No. 565,417 (Def. Ex. DD), on November 9, 1944.

This British patent is for an excavating tooth including a wear-point numbered 4, which fits on the wedge shaped nose 2 of the adaptor. The wear-point and adaptor are spaced from each other at the rearward portion of the wear-point (Rep. Tr. 504), as well as at the vertex of the nose 2 and socket 3 (Def. Ex. DD, Figs. 1 and 2). The wear-point is secured to the nose of the adaptor by means of a resilient spring numbered 8, in cooperation with a pin numbered 5. The spacing and the spring cooperate to allow for wear. In the language of the British patent, “In this way the [wear-point] . . . is firmly secured to the [nose of the adapter]. . . .” (Def. Ex. DD, p. 1, ll. 60-62).

8. The White Patent—No. 2,325,991.

On April 7, 1943, Marshall J. White, filed an application for patent for a Bucket Tooth Unit. The tooth shown in this patent (Def. Ex. W) is also of the two part type including an adaptor numbered 1 and a wear-point 6. Here again the wear-point includes a wedge shaped socket for cooperation with the wedge shaped nose of the adaptor.

As can be seen particularly in Figure 3, the upper portion of the wear-point is of considerably greater thickness than the lower portion (Rep. Tr. 507).

The White patent issued August 3, 1943.

D. The Baer Patent in Suit.

The application for the Baer patent in suit was filed June 6, 1945, more than one year subsequent to the issue dates of each of the prior art United States patents described above. During the course of prosecution before the Patent Office, the Examiner cited a number of prior art patents including some of those described above but not including the McKee patent (Def. Ex. AA), the British patent (Def. Ex. DD), nor either of the Mekeel patents (Def. Exs. BB and QQ).

1. The Structure Defined in the Baer Patent.

The Baer patent relates to an excavating tooth of the two part type including an adaptor numbered 20 and shown separately in Figure 7, and a wear-point numbered 42 and shown separately in Figure 6. The wear-point includes a wedge shaped socket 45 adapted to engage the wedge shaped nose 26 of the adaptor.

The upper wall or spike 43 of the wear-point, as shown in Figures 3 and 5 of the drawings, is of thicker or heavier section than either the side or bottom walls. In the descriptive portion of the patent, this spike is mentioned no less than nine times (Pl. Ex. 2, col. 2, l. 47; col. 3, ll. 22, 24, 29, 30, 35, 37 and 47 and col. 4, l. 27) but nowhere is found any reason for its being heavier than the other walls or even heavy at all.

In the descriptive portion of the patent there is not even a mention of the spike's "relative" heaviness and, in fact, no comment whatsoever is made on the thickness, weight or heaviness of the spike.

As can be seen particularly in Figure 2 of the Baer patent, the joint between the rear of the wear-point and the forward shoulder of the adaptor includes a tongue and recess configuration. In this instance rearwardly extending tongues are on the wear-point and cooperating recesses are on the adaptor. The upper and lower surfaces of both the tongues and the recesses are substantially parallel, not only to each other, but also to the upper wedge face of the nose (Pl. Ex. 2, col. 2, ll. 35-41). The manner of co-operation and the purpose of the tongues is set forth in the patent as follows:

"Since the tongues 48 are provided on the tooth point 42 to improve the lateral stability of the tooth point with respect to the adapter as well as to prevent relative movement or creeping between the tooth point and the adapter, the tongues desirably fit snugly between the substantially parallel upper and lower surfaces 38 and 39 of the recesses 37". (Pl. Ex. 2, col. 3, ll. 4-11)

As can be seen particularly in Figure 3 of the Baer patent, there is space between the wear-point and adaptor at the rear of the tongues 48; at the shoulders 32 and 36; and also at the vertex of the socket and nose 26. As can be seen in Figure 3, the wear-point is held onto the adaptor by means of a pin 65, which is retained by a resilient member 50. The pin extends through an opening 63 in the spike 43 and part way through an opening 58 in the

adaptor nose. The pin seats against the back wall of both openings 63 and 58.

The purpose of these various spaces is set forth in the descriptive portion of the patent as follows:

“The length of the tongues is preferably less than the longitudinal depth of the recesses 37 to provide a clearance, as indicated at 49 in Figure 2, between the end surfaces of the tongues and recesses so that the seating of the tongues may not interfere with the firm seating of the tooth point upon the nose of the adapter”. (Pl. Ex. 2, col. 3, ll. 11-18)

. . .

“To allow for wear and the effects of impact against the tooth point in use, the dimensions of the nose relative to those of the socket are such as to provide end clearances, as shown in Figures 2 and 3 between the inner end of the socket and the rounded end 30 of the nose as well as between the surfaces of the tooth point adjacent the open end of the socket and the shoulders at the forward end of the shank portion 22 of the adapter.” (Pl. Ex. 2, col. 3, ll. 60-68)

The general features of the Baer patent are summarized by Baer as follows:

“... the disclosed construction provides coacting tooth point and adapter parts which effect and maintain firm seating engagement of the tooth point upon the adapter and prevent relative lateral or longitudinal movement between the adapter and tooth point. In addition, the tooth point is removably held in position by a readily accessible and easily removed key.”

(Pl. Ex. 2, col. 4, ll. 64-72)

2. The Claims of the Baer Patent In Suit.

The Baer patent includes nine claims. Claims 1 through 7 specifically relate to the adaptor portion of the tooth either alone or in combination with the wear-point. Claim 5, directed to the combination of the adaptor and the wear-point, was charged at the trial to be infringed by way of inducement. No inducement was found by the district court and consequently, Claim 5 was found not infringed and is not in contest here. Claims 8 and 9 of the Baer patent, directed to the wear-point itself, were charged and found by the district court to be infringed.

a. Claim 8.

Claim 8 of the Baer patent (Pl. Ex. 2, col. 7, l. 66) begins by defining the *adaptor* which the wear-point is "adapted to receive". The adaptor is recited as having a wedge shaped nose with a rounded front end and parallel side faces together with an enlarged rear shank portion including recesses. The recesses are recited as having edges which are parallel not only to each other but also to one of the wedge faces of the nose. The claim continues and defines the wear-point itself as including:

1. "a spike portion of relatively heavy section,"
2. "a housing portion having side walls"
3. "and an integral web"
4. "forming with the spike portion, a wedge-shaped socket having an open end at one end of the spike portion,"
5. "said wedge-shaped socket being of a depth and shape normally and firmly to receive the wedge-shaped nose of the adapter with space between the nose [*sic*] and adapter at the vertex of the socket"

6. "and with the spike and housing portions substantially spaced from the shank portion of the adapter,"
7. "and said side walls of the housing portion having integral projecting tongues thereon adjacent the open end of the socket,"
8. "and said tongues having substantially parallel side edges adapted to fit into said recesses of the adapter shank portion when the nose is seated in the socket, thereby to support the tooth [*sic*] on the adapter in directions transverse to the wedge faces."

Here in Claim 8 and in one other claim, Claim 6 (not here in issue), are the only places in the entire patent in which the weight of the "spike portion" is mentioned. Here and in Claim 6, it is recited that the spike portion is "of relatively heavy section". But neither claim (nor any other portion of the patent) indicates why it is relatively heavy or with respect to what it is relatively heavy.

Claim 8 also particularly recites that the dimensions of the socket are such that when seated on the adaptor there is a space between the wear-point and the adaptor at the vertex of the wear-point socket. This refers to the space shown in Figure 3 of the patent, at reference numeral 30. The claim also recites that the spike and housing portions of the wear-point are substantially spaced from the shank of the adaptor. This refers to the space at the shoulders 32 and 36 of Figure 3.

Claim 8 also recites that the wear-point includes projecting tongues and further that the tongues have "substantially parallel side edges". These so-called "side

edges” refer to the upper and lower edges as shown at 38 and 39 in Figure 2 of the patent (Rep. Tr. 422).

Claim 8 goes on to recite that these tongues with their substantially parallel upper and lower edges are “adapted to *fit* into said recesses of the adapter shank portion” (emphasis supplied) when the nose is seated in the socket. Referring to Figure 3 of the Baer patent this language defines the interfitting relationship of the tongues and the recesses at a time when the wedge faces of the wear-point socket are pushed all the way back on the nose of the adaptor (Rep. Tr. 263).

b. Claim 9.

Claim 9 of the patent, like Claim 8, begins by describing the adaptor upon which the wear-point is seated. The adaptor is described as having a wedge shaped nose with an enlarged shank portion and recesses in the shank portion having edges which are parallel to each other and to one of the wedge faces. The claim then goes on to describe the point to which it is directed as including:

1. “integral spike and housing portions”
2. “together forming a wedge-shaped socket”
3. “having wedge faces of an angularity substantially equal to that of the diverging adapter wedge faces”
4. “and lengths such that the adapter nose is normally spaced from the socket vertex,”
5. “said housing portion having opposed and integral side tongues thereon displaced laterally of socket wedge faces and projecting rearwardly from the housing portion,”
6. “said tongues having substantial parallel edges and parallel relationship to one of the socket wedge faces

and adapted to fit between parallel edges of said recesses to provide support for the tooth point in addition to the wedge faces,”

7. “and said tongues being normally too short to reach the ends of said recesses so as to present the interference with the seating of the wedge faces.”

Claim 9 is very similar to Claim 8 but with certain differences. In Claim 9 there is no statement that the spike portion is relatively heavy. In Claim 9, like in Claim 8, there is a spacing recited at the vertex of the socket but there is no general space recited between the adaptor and the wear-point. Claim 9 does, however, recite a space between the rearward portions of the tongues and recesses in the adaptor. This is the space shown at 49 in Figure 2 of the Baer patent.

With respect to the parallel relationship of the tongue surfaces, Claim 9 differs from Claim 8, in that Claim 8 recites the relationship between the upper and lower edges of the tongue and recess as being *substantially* parallel with one of the wedge faces. Claim 9 recites that the edges of the tongues are substantially parallel with each other but that they are “in parallel relationship to one of the socket wedge faces”.

c. Claim 5.

While Claim 5 is not here in contest its recitations are important in that Claim 5 does not include any recitation of tongues or recesses on either the point or the adaptor. Rather, Claim 5 recites among its several elements, “additional means stabilizing the tooth point relative to the adapter in a direction laterally of the nose,”. The addi-

tional means are means in addition to the wedge faces themselves which, according to Baer, “provide effective and durable gripping surfaces on the projecting nose 26 and within the coacting socket 45, it is preferred that the surfaces which seat together shall be the wedge surfaces of the parts” (Pl. Ex. 2, col. 3, ll. 50-54). In the Baer patent the only *additional* means are the parallel edged coacting tongues and recesses (Rep. Tr. 241, 242).

3. The Baer File Wrapper—Defendant’s Exhibit M.

The claims here under consideration, Baer Claims 8 and 9, were known as Claims 17 and 18 during the prosecution of the Baer patent application. These claims were first added by an amendment to the application received in the Patent Office September 18, 1947. In the paper in which these claims were added, Baer’s attorney made certain remarks concerning them and these remarks appear in the file wrapper (Def. Ex. M), at pages 35 to 37.

At page 35 of the file wrapper Baer’s attorney emphasized the need for spacing between the point and the adaptor so as to allow for wear.

At page 36 of the file wrapper, Baer’s attorney stated the reasons for the parallel edges on the rearwardly extending tongues. Here the attorney stated:

“Additionally, the bracing action of the tongues is effected through *parallel side edges* thereof which are parallel to one of the wedge surfaces, so that those tongues do not interfere with the continued seating engagement of the tooth point on the adapter nose. . . . Thus, while the tooth point may move longitudinally of the adapter nose to maintain seating engagement of the wedge surfaces, the *parallel edges of the*

tongues remain in engagement with the edges of the recess without interfering with the longitudinal seating of the tooth point on the adapter nose". (emphasis supplied)

On that same page 36 of the file wrapper, Baer's attorney emphasized that Claims 17 and 18 were devoted to a point "having specific structural details for effecting the maintenance of the seating engagement between the contacting wedge and tongue surfaces of an adapter".

On page 37 of the file wrapper Baer's attorney characterized the Seal patent (Def. Ex. R) described above as follows:

"The Examiner has apparently relied upon the disclosure of the Seal patent to indicate the use of tongues on the side of a tooth point. It is to be observed that *the side tongues of Seal would be useless in the applicant's disclosed structure, because they are wedge-shaped* and, consequently, could not be made to maintain engagement for reinforcing purposes during any longitudinal movement of the tooth point relative to the adapter." (emphasis supplied)

E. The Esco Commercial Structures.

The Esco commercial structures can be classified into three groups. The first group includes the Esco Models R-4, R-5, R-6 and R-7, of which the R-6 is representative and is as shown in the drawing (Pl. Ex. 25).

The second group of the Esco commercial points includes the Esco Model R-3 (Def. Ex. A) and one manufactured by Esco for Caterpillar Tractor Co., Model 2K4678 (Def. Ex. D). The third type of Esco commercial point is Esco's Model R-34S (Def. Ex. B).

Each of the above mentioned points manufactured commercially by Esco is marked with the number of the Baer patent in suit—No. 2,483,032.

1. The Esco R-4, R-5, R-6 and R-7 Wear-Points.

As shown in Plaintiff's Exhibit 25 the Esco R-6 wear-point includes rearwardly extending tongues having non-parallel upper and lower edges. Moreover, as can be seen from the same exhibit the lower edge of the Esco tongues does not contact the lower edge of the recess in the adaptor.

In this group of commercial points, the wear-point is retained on the adaptor by a pin extending through the top of the point and partially through an opening in the nose of the adaptor (Rep. Tr. 109) but the pin does not contact the rear wall of the opening in the adaptor (Rep. Tr. 111, 112).

2. The Esco R-3 and the Caterpillar 2K4678.

In this classification of point there is no rearwardly extending tongue at all but rather a slight depression or recess at the rear edge of the wear-point. In the case of these two commercial teeth the pin extends through both the upper and lower walls of the wear-point (Rep. Tr. 229, 230).

3. The Esco R-34S Point.

In this instance, the Esco commercial wear-point does not include rearwardly extending tongues but rather includes forwardly extending recesses. As stated by Esco's own witness (Rep. Tr. 249, 592) these forwardly extend-

ing recesses are additional stabilizing means when cooperating with forwardly extending tongues on the mating adaptor (Def. Ex. C).

F. The Accused Hensley Points.

A number of different Hensley points have been accused of infringement. These include early models which were manufactured prior to 1961 and exemplified broadly by Plaintiff's Exhibit 4 (Rep. Tr. 116). As to the small number of points involved in this early activity, infringement has been admitted if the patent is valid (Clk. Tr. 216, 217). In 1961, following a charge of infringement by one of Esco's representatives, Hensley changed the configuration of its wear-points (Rep. Tr. 319, 320) to that exemplified broadly by Plaintiff's Exhibit 5. The accused points in the changed configuration include four different sizes—4 inch (Pl. Ex. 5), 5 inch (Def. Ex. J), 6 inch (Pl. Ex. 10) and 7 inch (Pl. Ex. 32) having the respective Hensley model Nos. R-4HX, R-5HX, R-6HX and R-7HX.

While the Hensley points differ from the Esco points of similar model designation, the Hensley wear-points were manufactured to be used with the various sized Esco adaptors (Rep. Tr. 183). The Hensley points are *replacement* points and are, therefore, dimensionally similar to those originally supplied by Esco (Rep. Tr. 171, 316, 317) but there are certain differences over the Esco models. A specific difference resides in the shape of the rearwardly extending tongues (Rep. Tr. 173, 174, 320).

Each of the Hensley points includes rearwardly extending tongues but in the case of each different size of Hensley point, the shape of the tongues is different. In

the Hensley R-4HX wear-point (Pl. Ex. 5) the angle between the upper and lower surfaces of the rearwardly extending tongues is about 60° (Rep. Tr. 352, 353). The Hensley model R-6HX (Pl. Ex. 10) has tongues with upper and lower faces at an angle of about 35° (Rep. Tr. 353, 354) (Def. Ex. TT). With respect to the Hensley R-7HX (Pl. Ex. 32) the rearwardly extending tongues have upper and lower edges at an angle of between 5° and 15° (Rep. Tr. 665-667). As is apparent from Defendant's Exhibit J, the Hensley R-5HX point has rearwardly extending tongues with an angle somewhat between that of the R-4HX and the R-6HX; that is between 35° and 60° .

G. Esco's and Hensley's Tests for Infringement.

In order to show that the accused Hensley points provide the stabilization set forth in the Baer patent, Esco tested two of Hensley's points (Pl. Exs. 9 and 10), both points being of the six inch size. The test was made by attaching the Hensley point on an Esco adaptor specially ground for the purposes of the test (Rep. Tr. 105) and rigidly clamping the adaptor (Rep. Tr. 71). A heavy weight was then dropped like a guillotine, onto the tip of the wear-point to see if the force of the dropped weight could urge the rearwardly extending tongues of the Hensley wear-point into contact with the specially ground recesses of the test adaptor (Rep. Tr. 202).

Esco's previous experience with this guillotine test showed that the normal test impact was 6,000 foot-pounds (Rep. Tr. 63). One of the Hensley points (Pl. Ex. 9) was tested at 16,000 foot-pounds at which point it fractured (Rep. Tr. 65). The other Hensley point (Pl. Ex. 10) was

tested at 18,000 foot-pounds (Rep. Tr. 67). No determination was made on either of the Hensley points as to whether or not the tongues contacted the recesses at the normal test impact of 6,000 foot-pounds (Rep. Tr. 76, 77).

Hensley also tested for infringement but instead of using an impact, Hensley applied steadily increasing pressure until the tooth—either the wear-point or the adaptor—broke. Hensley tested his own 4, 5, and 6 inch points (Rep. Tr. 324) and recorded these tests on a motion picture film (Def. Ex. H). With this test no support was found between the Hensley tongues and recesses until the tooth was actually destroyed (Rep. Tr. 325, 326). Esco's witness, Dr. Graf admitted that the Hensley test, at least in so far as the 4 inch point was concerned, was a fair test (Rep. Tr. 574).

H. The Trial and Decision.

The trial of this cause was held from October 6, 1964 (Rep. Tr. 2) through October 9, 1964 (Rep. Tr. 477). The trial court did not issue its Memorandum Opinion and Order until September 8, 1965—eleven months after trial (Clk. Tr. 474). The Finding of Fact, Conclusion of Law and Judgment were filed promptly thereafter on September 27, 1965 (Clk. Tr. 517, 518, 520A).

QUESTIONS INVOLVED ON APPEAL

This appeal involves directly two main questions and indirectly a number of subordinate issues as set forth in the Specification Of Errors Relied Upon. The two main questions are:

1. Does The Baer Patent Disclose Patentable Novelty Over The Prior Art?

This question arises on the face of the Baer patent itself, on the prior art patents in general and specifically on the prior art Mekeel '677 patent (Def. Ex. BB). The district court considered the Mekeel '677 patent at length and found "It would appear that teeth based on the Mekeel patent, the defendant's most pertinent over all reference against the Baer patent, were never actually constructed and thus never put to any commercial use or test" (Clk. Tr. 489) and that "the Mekeel patent was never utilized, and no known manufacture resulted from which its effectiveness could be evaluated." (Clk. Tr. 494). The district court also found that the tongues on the Baer point were not true equivalents to the tongues on the Mekeel adaptor (Clk. Tr. 493); that "Mekeel does not rely on tongues for additional stabilization, since a rigid lock is brought about by the expanded tenon which provides the connection between the point and the adaptor" (Clk. Tr. 495) and that Mekeel does not have a "heavy upper spike portion" on the point (Clk. Tr. 494). The district court also found "that the combination of the elements found in each of Claims 8 and 9 result [in] something new, a new co-action between elements, which would not have been obvious to one skilled in the particular art at the time invention was made".

2. If Claims 8 And 9 Of The Baer Patent Are Valid, Are They Infringed By The Hensley Points?

This question arises on the physical exhibits of the Hensley points presented at trial, the file wrapper of the Baer patent (Def. Ex. M) and on the face of the Baer patent itself. The district court, after noting the admitted infringement of the “first one hundred and nine points” (Clk. Tr. 482), found that “the defendant’s change in design and construction of its new points is insufficient to avoid its previously admitted infringement of these two claims” (Clk. Tr. 483). The district court reviewed evidence relating to tests for infringement and found “the Hensley tests, which were in the main made on smaller sized points (where the additional stabilization effect has lesser importance), were variable and impossible to evaluate . . . and no effort was made to test the larger seven inch point” (Clk. Tr. 485) and that “[t]he court is satisfied that the tongues on the Hensley-Esco type point serve the above indicated stabilization purpose and that this is the very reason they were retained” (Clk. Tr. 486). The district court also found that “[w]hile the sides of tongues on the smaller size Hensley-Esco type points may or may not be said to be substantially parallel, the sides of the tongues on the larger, seven inch, sized Hensley-Esco type points appeared to be as close to substantially parallel as measurement could provide” (Clk. Tr. 484). The district court also found “that the evidence does not sustain defendant’s defense of file wrapper estoppel” (Clk. Tr. 497).

SPECIFICATION OF ERRORS RELIED UPON

Hensley has condensed its specification of errors into two questions for this Court as set forth above.

To comply with Rule 18, Paragraph 2(d) of this Court, each error intended to be urged is set out separately and particularly as follows:

1. The Court erred in holding Claims 8 and 9 of United States Patent No. 2,483,032 to Baer, valid and infringed.

2. The Court erred in holding that “the defendant’s change in design and construction of its new points is insufficient to avoid its previously admitted infringement of these two claims” and was “at most a colorable change.”

3. The Court erred in holding Claims 8 and 9 of said Baer Patent No. 2,483,032 generally infringed by defendant’s points without differentiation as to the various models of points.

4. The Court erred in construing Claims 8 and 9 of said Baer Patent No. 2,483,032 such as to find the basic features thereof in the defendant’s points.

5. The Court erred in holding that the tongues on the defendant’s points in general serve a stabilization purpose without differentiation as to various models of points.

6. The court erred in giving a broad interpretation to the term “substantially parallel”, as such term is used in Claims 8 and 9 of said Baer Patent No. 2,483,032, in order to find infringement thereof.

7. The Court erred in failing to hold that Claims 8 and 9 of said Baer Patent No. 2,483,032 are limited by the

statements made in the file wrapper of that patent and, as so limited, are not infringed.

8. The Court erred in failing to hold Claims 8 and 9 invalid in view of United States Patent No. 1,845,677 to Mekeel.

9. The Court erred in construing said Mekeel Patent No. 1,845,677 and said Baer Patent No. 2,483,032 such as to find that the tongues on the adaptor of said Mekeel patent are not a true equivalent to the tongues on the point which fit into the recesses of the adaptor of said Baer patent.

10. The Court erred in construing said Mekeel Patent No. 1,845,677 to find that the point described therein is symmetrical.

11. The Court erred in construing said Mekeel Patent No. 1,845,677 so as to find that the point described therein does not provide a heavy upper spike portion.

12. The Court erred in holding that the features of said Baer Patent No. 2,483,032, as expressed in Claims 8 and 9 directed to a point only, include "spacing between the point and the adapter."

13. The Court erred in finding that the tooth of said Mekeel Patent No. 1,845,677 does not include spacing between the point and adaptor.

14. The Court erred in construing said Mekeel Patent No. 1,845,677 such as to find that it was never utilized and that no known manufacture resulted from which its effectiveness could be evaluated.

15. The Court erred in construing the prior art patents, including said Mekeel Patent No. 1,845,677, such

as to find that each has “less than the full combination of elements specified in either Claims 8 or 9.”

16. The Court erred in basing its holding of validity of Claims 8 and 9 of said Baer Patent No. 2,483,032 upon a comparison of the prior art with structures manufactured by the plaintiff rather than with the structure defined by said Claims 8 and 9.

17. The Court erred in basing its holding of validity of Claims 8 and 9 of said Baer Patent No. 2,483,032 upon a comparison of the entire tooth structure of said Mekeel Patent No. 1,845,677 rather than to the structure of the point alone to which Claims 8 and 9 are directed.

18. The Court erred in holding that the combination of elements found in each of Claims 8 and 9 of said Baer Patent No. 2,483,032 would not have been obvious to one skilled in the particular art at the time the alleged invention was made.

SUMMARY OF ARGUMENT

A. The Invalidity of the Baer Patent.

As tested under the patent laws, demanding both novelty and non-obviousness, the Baer patent must fall. It has been stripped of its initial, but rebuttable, statutory presumption of validity by the Patent Office's failure to consider the most pertinent prior art. Esco's attempts to bolster the initial presumption with a showing of commercial success is not even to be considered because of a complete absence of any showing that the success was due to the patented features. Even so, commercial success is at best a makeweight in cases of questionable patent validity.

Here the invalidity of the Baer patent is not questionable. The prior art Mekeel '677 patent teaches the same structure as set forth in the Baer patent claims in issue. The alleged differences between Mekeel and Baer are nonexistent. Mekeel teaches Baer's interacting tongues and recesses for Baer's same purpose of stabilization. But even if it did not, Esco has admitted the equivalency of the Mekeel and Baer structures in this respect. The spacing between the wear-point and adaptor is admitted by Esco to be inherent in the Mekeel construction. But even if not so admitted, such spacing is obvious and Mekeel himself, in a later patent, described it for Baer's same purpose of allowing for wear between the parts. Mekeel also teaches the relatively heavy spike portion defined in Claim 8 of Baer, in that all of the walls of the Mekeel point are relatively heavy. But even if it did not, no patentable significance can be placed on this element of Claim 8. Baer, in his patent, did not even mention it and furthermore, the same structure is found in other prior art patents for the very same purpose.

The various elements of the Baer structure are all found in the prior art—and all perform the very functions Baer attributed to them. Since, in a combination, the sum must be greater than its various parts in order to find patentability, the Baer patent must fall.

The findings and conclusions of the district court on the validity of the Baer patent are clearly erroneous and must be reversed.

B. The Non-Infringement of the Hensley Points.

Esco has failed to sustain its burden of proving infringement. The Hensley points cannot be lumped together as one typical point but are four different and very distinct configurations. Esco attempted to prove infringement by the Hensley six inch point but its efforts to show the claimed stabilizing function on the four and five inch points have been futile.

Infringement is determined by the *claims* of the patent and if one or more elements of a claim is absent, the accused structure does not infringe.

None of the Hensley points in issue include rearwardly extending tongues with "substantially parallel" side edges as called for in the Baer Claims 8 and 9 and as forcefully urged to be important when the Baer patent was being prosecuted before the Patent Office. Rather, the Hensley tongues more closely resemble the wedge shaped tongues of the prior art Seal patent. The tongues of the Hensley wear-points, when placed on Esco adaptors, do not "fit" into the recesses on the adaptor as called for in the claims, but rather there are distinct spaces or gaps between the tongues and the recesses.

Moreover, the Hensley points do not perform in the same way as the points defined in Baer claims 8 and 9. Because of the gaps between the Hensley tongues and the Esco adaptors, the tongues on the Hensley points do not provide stabilization when the point is used. The Esco test to show such stabilization on the six inch Hensley point is of little or no merit because of the extreme variation between the impact applied during the test and the impact which Esco itself considered "normal".

With respect to infringement, too, the findings and conclusions of the district court are clearly erroneous and must be set aside.

ARGUMENT

A. THE BAER PATENT IS INVALID BECAUSE IT TEACHES NOTHING MORE THAN WHAT WAS ALREADY KNOWN IN THE PRIOR ART.

The validity of a patent is to be tested under two sections of the patent law, 35 U.S.C. §§102 and 103 (1952). The first of these states:

“A person shall be entitled to a patent unless—
... (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, . . .”

Section 103 of the patent law states:

“A patent may not be obtained though the invention is not identically disclosed or described as set forth in Section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains . . .”

As recently stated by the Supreme Court referring to these two sections of the statute along with Section 101:

“An analysis of the structure of these three sections indicates that patentability is dependent upon three explicit conditions: novelty and utility as articulated and defined in Section 101, and Section

102, and nonobviousness, the new statutory formulation, as set out in Section 103.”

Graham v. John Deere Co., 15 L.Ed.2d 545, 553.

The Baer patent is invalid under both sections 102 and 103 as set forth below.

1. The Statutory Presumption of Validity Has Been Completely Overcome Because the Patent Office Failed to Consider the Most Pertinent Prior Art.

Upon issuance of the Baer patent on September 27, 1949, it acquired a statutory presumption of validity. 35 U.S.C. §282 (1952) amended 79 Stat. 261 (1965).

The presumption, however, is at best a rebuttable one, even in that situation where the district court has before it only the prior art considered in the Patent Office itself. *Kwikset Locks v. Hillgren*, 210 F.2d 483 (9th Cir. 1954).

In the instant case the Patent Office Examiner did not consider the Mekeel '677 patent (Def. Ex. BB) nor the Mekeel '988 patent (Def. Ex. QQ). The first of these, the Mekeel '677 patent was conceded by the district court to be the most pertinent reference against the Baer patent in suit (Clk. Tr. 489). When the most pertinent prior art, as here, was not considered by the Patent Office, the presumption of patent validity is nil. As stated by this Court in *Jaybee Mfg. Corp. v. Ajax Hardware Mfg. Corp.*, 287 F.2d 228, 229 (9th Cir. 1961):

“Generally, the action of the Patent Office in allowing the patent creates a presumption of validity. However, even one prior art reference which has not been considered by the Patent Office may overthrow this presumption . . . (citing cases). When the most pertinent art has not been brought to the attention of

the administrative body the presumption is largely dissipated.”

In summary then, the Baer patent in suit reaches this Court completely denuded of any statutory presumption as to its validity. *Jacuzzi Bros., Inc. v. Berkeley Pump Co.*, 191 F.2d 632 (9th Cir. 1951); *Gomez v. Granat Bros.*, 177 F.2d 266 (9th Cir. 1949).

2. The Commercial Success of the Esco Wear-Points Cannot Lend Validity to Claims 8 and 9 of the Baer Patent Because the Esco Points Are Not In Accordance with These Claims and Furthermore Commercial Success Alone Is Not Patentable.

Esco manufactures and sells two part excavating teeth including an adaptor and a wear-point under Esco Model Nos. R-4, R-5, R-6 and R-7. These particular points have been commercially successful and, in fact, it is because of Hensley's manufacture and sale of the expendable and replaceable wear-point portion of these teeth that Esco has charged infringement.

Esco also manufactures and sells additional excavating teeth bearing the Model Nos. R-3 and R-34S and Caterpillar No. 2K4678 (Rep. Tr. 227, 228). All of these Esco teeth are marked with the notice of the Baer patent in suit (Rep. Tr. 227, 228). Despite the fact that all of these Esco points bear the number of the patent in suit, Esco's own witness admitted that there is no common feature of the points which would tend to make them commercially successful (Rep. Tr. 228, 229). The fact that the Esco teeth were commercially successful could stem from a number of reasons other than the merits of the patented tooth. It is significant, for example, that Esco's commer-

cial success commenced shortly after World War II, at the beginning of a large highway building program (Rep. Tr. 310).

Despite Esco's allegations of commercial success as to its Models R-4, R-5, R-6 and R-7, none of these commercially successful points were shown to the trial court. Esco's only showing at the trial of a commercial Esco excavating tooth (of the R-4, R-5, R-6 or R-7 type) was in the form of a drawing of an Esco *adaptor* (Pl. Ex. 25), with penciled sketches showing the relationship of the tongues and recesses. But even from this drawing it is obvious that the rearwardly extending tongues of the Esco wear-points do not include upper and lower *parallel* surfaces. The trial court had no evidence before it upon which to base its finding that the "Baer-type excavating teeth"—particularly in accordance with Claims 8 and 9—"enjoyed an immediate and widespread commercial success" (Clk. Tr. 488).

Moreover, to test the Hensley wear-points in comparison with its patented wear-point, Esco had to specially build a wear-point as shown in the Baer patent for use in its tests (Rep. Tr. 58, 62). Furthermore, Esco had to specially grind an adaptor for use in these same tests (Rep. Tr. 105).

The plain fact is that the teeth actually manufactured by Esco do not conform to the teachings of the Baer patent in suit. The teeth claimed in the Baer patent, particularly Claims 8 and 9, have never been shown by Esco to be commercially successful.

But even if commercial success were proved, the patent would still be invalid. In commenting upon the use of

commercial success to validate a patent the Supreme Court in its recent decision in *Graham v. John Deere Co.*, 15 L.Ed.2d 545, 566 (1966), first noted that:

“Cook Chemical insists, however, that the development of a workable shipper-sprayer eluded Calmar, who had long and unsuccessfully sought to solve the problem. And, further, that the long-felt need in the industry for a device such as Scoggin’s together with its wide commercial success supports its patentability. These legal inferences of subtests do focus attention on economic and motivational rather than technical issues and are, therefore, more susceptible to judicial treatment than are the highly technical facts often present in patent litigation. (citing authorities) Such inquiries may lend a helping hand to the judiciary which, as Mr. Justice Frankfurter observed, is most ill-fitted to discharge the technological duties cast upon it by patent litigation. (citing cases) They may also serve to ‘guard against slipping into hindsight’, (citing cases) and to resist the temptation to read into the prior art the teachings of the invention in issue.”

But then went on to explicitly hold:

“However, these factors do not, in the circumstances of this case, tip the scales of patentability.”

The authorities are clear that commercial success cannot validate a patent. *Monroe Auto Equipment Co. v. Superior Industries Inc.*, 332 F.2d 473 (9th Cir. 1964); *Farr Co. v. American Air Filter Co.*, 318 F.2d 500 (9th Cir. 1963). This is particularly so, as here, when there is no evidence that the success was attributable to the features or structures patented. *Heath v. Frankel*, 153 F.2d 369 (9th Cir. 1946).

3. The Effect of the Mekeel '677 Patent as Prior Art Cannot be Diluted by Labeling It a Paper Patent—Esco Itself Has Given Mekeel Commercial Utility.

The trial court placed great emphasis on the allegation that the Mekeel '677 patent (Def. Ex. BB) was not adopted by the art and consequently was not subjected to the tests of actual usage (Clk. Tr. 489, 494, 495, 496). This is clearly a misplaced emphasis in view of the Supreme Court's recent statement on the relevancy of prior art not actually used. In *Graham v. John Deere Co.*, 15 L.Ed.2d 545, 567 (1966), the Court held:

“It is also irrelevant that no one apparently chose to avail themselves of knowledge stored in the Patent Office and readily available by the simple expedient of conducting a patent search—a prudent and nowadays common preliminary to well organized research.”

But aside from the misplaced emphasis, the trial court has clearly erred on the facts. The Mekeel '677 patent, at least the wear-point shown and described in that patent, has been commercially used by Esco itself. In this regard, it should be remembered that only the wear-point is involved in Esco's charge of infringement on Claims 8 and 9 of the Baer patent.

Esco manufactures and sells a wear-point identified as Model No. R-34s (Def. Ex. B) which cooperates with the Esco adaptor No. WRR-34 (Def. Ex. C). A visual comparison of the Esco R-34S point with Figure 8 of the Mekeel '677 patent (Def. Ex. BB) makes it obvious that the wear-point taught by Mekeel has been used. Moreover, the actual use of this structure has been by Esco itself.

The Esco adaptor WRR-34 (Def. Ex. C) does not appear identical to the adaptor shown in Figure 9 of the

Mekeel '677 patent (Def. Ex. BB). Referring to the Mekeel '677 patent it can be seen that the nose of the adaptor is split to form a tenon, whereas the nose of the Esco adaptor is not. But, as noted above, the claims here in suit, Claims 8 and 9 of the Baer patent relate only to the *wear-point* and not to the adaptor nor to the combination of the wear-point and adaptor.

The conclusion is inescapable that the Esco R-34S wear-point is the same as that shown in Figure 8 of the Mekeel '677 patent. The structure of the Mekeel '677 patent *was* recognized and used by the industry and by Esco itself. Mekeel '677 is not a paper patent.

- 4. The Teachings of the Baer Patent Are the Same As Those in the Mekeel '677 Patent and Baer Is Therefore Invalid.**
 - a. The Alleged Differences of Baer are Actually Nonexistent.**

During the course of this litigation in the district court, Esco has urged three features as being the major distinctions between the Baer and Mekeel structures as they relate to Claims 8 and 9. These three features include: 1. the reversal of the tongues and recesses by Baer's putting the tongues on the point and the recesses on the adaptor, rather than the reverse as shown in the Mekeel '677 patent; 2. heavier upper spike portion of the Baer point (Claim 8 only); and 3. spacing between the parts of the wear-point and the adaptor.

It has also been contended that the Mekeel '677 patent cannot anticipate Baer because Mekeel's wear-point is symmetrical or reversible (can be turned upside down on the adaptor) and Baer's is not. However, Esco's own expert witness, Dr. Graf, refutes this contention with re-

spect to Mekeel. Relative to the reversibility of the Baer and Mekeel teeth, Dr. Graf stated:

“Well, in the Baer construction, the top surface—these are not reversible teeth in the Baer and they are not in this either.

Mr. Fallon: They are not in this?

The Witness: They aren't, are they?

I don't think they are. According to this drawing, it's not symmetrical, so this point is not symmetrical, so I would judge they are not intended to be reversible. However, I don't know . . .” (Rep. Tr. 581, 582).

Moreover, the Baer patent does not anywhere indicate that it is directed specifically to a non-reversible point. In fact, one of the commercial wear-points (Def. Ex. D) which Esco has marked with the Baer patent number, is of the reversible type—the point can be turned upside down on the adaptor. Such reversibility was admitted by plaintiff's witness, Mr. Eyolfson, when confronted with an actual demonstration in court (Rep. Tr. 661, 662). It should also be recognized that reversibility is not mentioned in either of the claims here involved.

i. The Equivalence of Reversed Tongues and Recesses Is Found Not Only on the Face of the Mekeel '677 Patent but Also By Esco's Own Witnesses.

Claim 8 of the Baer patent recites inferentially that the adaptor portion of the tooth should include recesses extending from the side faces. Claim 8 also recites affirmatively that the wear point portion of the tooth includes “integral projecting tongues thereon adjacent the open end of the socket,”. The Mekeel '677 patent does not show a wear-point with extending tongues but rather the wear-

point as shown in Figure 8 of Mekeel includes recesses at the rear thereof which cooperate with mating tongues on the adaptor. This, of course, is the exact reverse of what is shown in the Baer patent. But the teaching of the Mekeel '677 patent is far broader than the mere showing in the drawing. Particularly, the Mekeel specification states:

“In this modification of the invention I have likewise shown an additional feature which may be included in the assembly, whether of the form shown in Figures 1 to 6 inclusive, or of the form shown in Figures 7 to 10 inclusive. This consists of tongues formed in *one member* of the assembly, which project beyond the plane of the case of the point and are engaged in a recess in the *other member* of the assembly. *As illustrated*, this consists of tongues 23,23 formed on the sides of the nose 16a and engaging in suitable recesses 24,24, formed in the sides of the point at the base thereof. *This construction adds rigidity to the connection of the parts.*”

(Def. Ex. BB, p. 2, ll. 77-91) (emphasis added)

It is clear then that the Mekeel '677 patent places no special significance on the tongues being on either the point or the adaptor. Also the tongues and recesses of Mekeel are for the same purpose as in Baer.

This interlocation of tongues and recesses is not only disclosed in the Mekeel '677 patent, but it has been indicated by Esco to be within the scope of the claims of the Baer patent. While the Baer patent speaks only of rearwardly extending tongues on the wear-point, Esco has clearly shown that its interpretation of the Baer patent includes not only tongues on the wear-point but also

recesses on the wear-point for receiving forwardly extending tongues on the adaptor.

As mentioned above, Esco itself manufactured and sells a wear-point R-34S (Def. Ex. B) which it marks with the number of the Baer patent in suit, number 2,483,032. The R-34S point (Def. Ex. B) does not have the extending tongues shown in the Baer patent; but rather, it has recesses for receiving the forwardly extending tongues of a cooperating adaptor (Def. Ex. C) (Rep. Tr. 592). In order to justify the patent marking on the R-34S, it has been urged that this point is covered by Claim 5 of the patent (Rep. Tr. 284).

Among other elements, Claim 5 calls for “*additional means* stabilizing the tooth point relative to the adaptor in the direction laterally of the nose” (emphasis supplied).

The patent law states:

“An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification *and equivalents thereof*.”

35 U.S.C. § 112 (1952) (emphasis supplied)

In the Baer patent, the only “additional means” of support are the rearwardly extending tongues with parallel edges fitting snugly into the recesses of the adaptor as shown in the drawings of the Baer patent (Rep. Tr. 241).

On cross-examination, Esco’s witness, Mr. Wilcox, stated that the various equivalents of this “additional

means'' includes the reverse structure; that is, recesses on the point and tongues on the adaptor (Rep. Tr. 248, 249). In addition, Esco's expert witness, Dr. Graf, testified that the distinction between the reversed form of tongues and recesses is only a matter of degree (Rep. Tr. 591, 592).

Referring to the tongues and recesses in his '677 patent, Mekeel states:

''This construction adds rigidity to the connection of the parts.'' (Def. Ex. BB, p. 2, ll. 90, 91)

In addition, Hensley's expert witness, Mr. Foster, likewise testified that the reversal of tongues and recesses between the point and the adaptor is merely a matter of degree and that in either case stabilization is provided (Rep. Tr. 480, 481).

In view of the statements in the Mekeel patent itself, in view of Esco's patent marking on the R-34S wear-point, in view of the statements made by Esco's own witnesses, Mr. Wilcox and Dr. Graf, and in view of the testimony of Hensley's witness, Mr. Foster; it is clear that, contrary to the finding of the district court (Clk. Tr. 493, 495), the rearwardly extending tongues of Mekeel do supply the additional stabilizing support and are the full equivalent of the tongues and recesses of the Baer patent.

Actually the district court's finding is based upon a clear misreading of the testimony. The court, at page 495 of the clerk's transcript, quotes the testimony of Mr. Paul Eyolfson at page 630 of the reporter's transcript which quote is as follows:

''The Court: In other words, you tell me there is no stabilizing effect there.

“The Witness: That’s right and what’s even more important is that once that thing moved forward in any degree it could not return because the thing would have seized tremendously. . . .”

Immediately following this quotation, the district court states:

“The basic teaching of Mekeel is entirely different from that of Baer. Mekeel does not rely on tongues for additional stablization, since a rigid lock is brought about by the expanded tenon which provides the connection between the point and the adapter.”

But the quoted portion of Mr. Eyolfson’s testimony *was not related to the tongues and recesses at all*. Rather the quoted portion of Mr. Eyolfson’s testimony related to frictional contact between the sides of the Mekeel adaptor nose and the inner-sides of the Mekeel point. Referring to the full testimony of Mr. Eyolfson on this point (from page 628 of the reporter’s transcript), this is made abundantly clear:

“... be that as it may, you can get it together, and I am assuming that the inventor here (Mekeel) is attempting to keep the upper and lower bearing surfaces in contact, and then by spreading this apart, also keep the side surfaces in contact in the initial situation. Now the side surfaces, if you put a transverse force on here, downward like so, the side surfaces, being virtually up and down, will have no effect on stopping vertical motion. Even though, even with the friction. And if you do that and allow a force to build up on the angular surfaces on the nose itself, you will have a tendency for that point to come forward, resisted by its own friction, and resisted by the side friction only on these two sides—since

the pin in the other views of this does not contact the nose or the point—I mean not the point at all—it only spreads apart the nose.

“You will actually strip this deal off—either you will explode that point if the material is ductile enough, you will deform it—

“The Court: In other words, you tell me there is no stabilizing effect there.

“The Witness: That’s right, and what’s even more important is that once that thing moved forward in any degree it could not return because the thing would have seized tremendously.”

There is no evidence at all to support the court’s finding that Mekeel does not rely on tongues for additional stabilization. Rather, there is preponderant evidence to the contrary. Consequently, it must be found that the Mekeel patent teaches the tongue and recess combination for the very purpose taught by Baer and further, that the particular embodiment shown by Mekeel with the recesses on the point and tongues on the adaptor, is the full equivalent of that shown and claimed by Baer with the tongues on the point and the recesses on the adaptor. The only difference is a mere matter of degree which is in and of itself not patentable. *Smith v. Nichols*, 88 U.S. (21 Wall.) 112 (1874); *Lovell Mfg. Co. v. Cary*, 147 U.S. 623 (1893); *Pierce v. Ben-Ko-Matic Inc.*, 310 F.2d 475 (9th Cir. 1962).

It is well established that the mere reversal of parts is not invention when the parts reversed serve the very same purpose. *Ronning Mach. Co. v. Caterpillar Tractor Co.*, 129 F.2d 70 (7th Cir. 1942); *Murray-Ohio Mfg. Co. v. E. C. Brown Co.*, 124 F.2d 426 (6th Cir. 1942); 2 DELLER’S

WALKER ON PATENTS, § 121, 2d ed. Without question, the purpose of the tongues and recesses in Mekeel (in the words of Mekeel himself) is to add “rigidity to the connection of the parts” (Def. Ex. BB, p. 2, ll. 90, 91). This is identical to the stated purpose of the Baer tongues and recesses which (in the words of Baer) is “to improve the lateral stability of the tooth point with respect to the adapter as well as to prevent relative movement or creeping between the tooth point and the adapter” (Pl. Ex. 1, col. 3, ll. 5-8).

Although the construction as shown in the Baer patent is possibly a better, more polished, embodiment of the original Mekeel invention, such mere carrying forward of Mekeel’s original thought, improving only the result, is not patentable. *Railroad Supply Co. v. Elyria Iron & Steel Co.*, 244 U.S. 285 (1917); *Market Street Cable Railway Co. v. Rowley*, 155 U.S. 621, 629 (1895); *Roberts v. Rider*, 91 U.S. 150, 159 (1875); *Willamette-Hyster Co. v. Pacific Car & Foundry Co.*, 122 F.2d 492 (9th Cir. 1941).

ii. The Relatively Heavy Spike Portion of Claim 8 is Found in Mekeel as Clearly as in the Baer Patent.

Claim 8 (but not Claim 9) of the Baer patent recites that the wear-point includes “a spike portion of *relatively heavy section*”. During the course of the trial, considerable importance was placed by Esco on the designation of the spike portion as being of heavy section. Esco’s witness, Mr. Eyolfson, at pages 623 through 626 of the reporter’s transcript defined the differences between the Baer wear-point and that as taught by Mekeel in terms of the importance of a heavy spike portion.

This testimony at trial was to the effect that it was advantageous to have the spike portion *heavy* so as to transfer the load from the tip of the wear-point to the tongues (Rep. Tr. 623, 624) but there is no evidence at all as to why the spike portion should be *heavier* than the other portions of the point.

The Baer patent, although *showing* the top portion of the point thicker than the lower in Figures 3 and 9, makes no mention in the descriptive portion thereof to the effect that the upper portion is thicker than the lower portion. As noted previously, the spike portion (numbered 43 in the drawings of the Baer patent) is mentioned in the descriptive portion at least nine times but in each case, it is referred to merely as a “spike portion”. No where is there any indication that it is to be relatively heavy. Clearly Baer placed no particular importance on the spike portion being heavier than any other portion of his tooth point.

The district court held that:

“Mekeel *does not provide the second coactive feature of Baer, the heavy upper spike portion of the point. . . .* The upper and lower faces (if there is a true upper and lower face to a reversible point) and the sides of the Mekeel point appear to be of the same thickness. . . . Hence, neither this feature nor the equivalent thereof appear in Mekeel. The fact that a heavy upper spike portion of the tooth appeared in other prior patents which did not provide the other coactive elements of Baer does not void the Baer patent. The absence of this spiked portion of the Baer patent alone is sufficient to defeat defendant’s claim that Mekeel anticipated Baer.” (emphasis in original)

(Clk. Tr. 494)

The court held that Mekeel does not have a heavy upper spike portion; but it should be realized that the claim does not call for a relatively heavy *upper* spike portion. The claim calls for a spike portion of relatively heavy section. No where in the specification or claims of the Baer patent is it recited that it is the "upper" portion of the point which is of relatively heavy section. Moreover, there is no indication throughout the entire patent that, if the spike portion is of relatively heavy section, it should be heavy relative to some other portion of the wear-point. There is no indication in the entire patent from which it can be concluded that the upper portion, or the spike portion, as shown in Baer, must be heavy relative to the side portions, to the lower portions of the point, or to some other portion of the entire tooth.

While it is possible to use expert testimony to clarify ambiguous portions of the patent claim, the claim cannot be construed to include what is beyond its clear language. *Burns v. Meyer*, 100 U.S. 671 (1879); *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 198 U.S. 399 (1905). Neither the claims nor the Baer patent specification give any indication as to what the spike portion is heavy relative to.

Even if the language of Claim 8 relating to the relatively heavy section were to be interpreted as plaintiff has suggested at trial, it would not add patentability to the Baer structure. Esco's own expert witness, Mr. Eyolfson testified that it was within the skill of the art. The exact testimony is as follows:

"The Court: Well, isn't that something that would be apparent to anyone familiar with the art?

“The Witness: Well, sure.

“The Court: Any mechanical engineer would know that?

“The Witness: Any mechanical engineer knows if he wants to stiffen up a beam, you could do that.”

(Rep. Tr. 624)

There was also other evidence that such thickening of the upper wall of a point was, in and of itself, well known and in common practice at the time of Baer's patent application. The thickened upper wall is shown, for instance, in the prior art, Hosmer, Crawford and White patents (Def. Exs. S, V and W).

Moreover, all of the walls of the wear-point shown in Figure 8 of the Mekeel '677 patent (Def. Ex. BB) are of relatively heavy section (Rep. Tr. 473). In fact, the entire point is relatively heavy. The obvious thickening of the spike portion is not inventive, 35 U.S.C. § 103 (1952); *Graham v. John Deere Co.*, 15 L.Ed. 2d 545.

iii. The Spacing Between Wear-Point and Adaptor is Inherent As Well As Obvious.

Both Claims 8 and 9 of the Baer patent refer inferentially to a spacing between the wear-point and the adaptor. As stated in the specification of the Baer patent, the reasoning for this spacing is to allow for wear and the effects of impact against the tooth point (Pl. Ex. 2, col. 3, l. 60). Esco's expert witness, Dr. Graf, recognized that such spacing is inherent in the Mekeel structure and would occur whether intentional or not. As stated by Dr. Graf, “Well, I am pretty sure that in any case there would be some spacing, considering ordinary casting toler-

ances. Whether it is intentional or not, I don't know." (Rep. Tr. 583).

Moreover, Mekeel himself, recognized the utility of this spacing in teeth of the type described in his first patent—the Mekeel '677 patent (Def. Ex. BB). In his second patent, the Mekeel '988 patent, he stated:

"The digging or dipper tooth, as shown herein, is of the two-part, reversible type, consisting of a point and of a [adaptor] . . . and is of the kind described in my pending application Serial No. 345,719 filed March 9, 1929, now patent No. 1,845,677; (Def. Ex. BB)—That is to say, it is a digging tooth including a part having a socket and a part having a slotted tenon engaged in said socket with means for expanding the tenon in the socket to lock the two parts together." (Def. Ex. QQ, p. 1, ll. 5-14).

"The angle of the converging engaging faces 17, 17 and 19, 19 of the point and [adaptor] . . . are so designed that when the tenon 12 is completely inserted into the socket 15 in the [adaptor] . . ., the ends 21 of the projections or nibs 18 terminate short of the bottoms 22 of the recesses 16 in the point and the rear end 23 of the point is spaced from the shoulders 20 on the [adaptor]. . . . Thus the thrust engagement between the [adaptor] . . . and point,—that is to say, between the two parts of the digging tooth, is provided entirely by the engagement of the faces 17 and 19, respectively, of the recesses 16 in the point and of the nibs or projections 18 of the [adaptor]. . . . By this means *any wear on the contacting parts will be taken up and compensated for by further driving the [point] . . . towards the [adaptor] . . . with no possibility of the shoulders 20 or the ends of the projections 18 engaging and thereby limiting that movement.*" (Def. Ex. QQ, p. 1, ll. 79-98).

The utility and advantage of spacing, as recognized by Mekeel, was the same as that recognized by Baer in his subsequent patent (Pl. Ex. 2).

Moreover, this same spacing was found in the other two part excavating teeth as shown by the prior art to McKee, Crawford, Hosmer and British patents (Def. Exs. AA, V, S and DD).

But even if the spacing between point and adaptor were to be considered a patentable feature of Baer—*it is a feature of the combination of the point and adaptor*—not of the point alone. Hensley only sells (and Baer Claims 8 and 9 are only directed to) the point alone. Logic demands that the features of the combination cannot be used to add patentability to the point alone.

As a final blow to Esco's stress on the importance of this spacing, the district court found:

“If the other features of Baer were present in Mekeel, this specification might not be too important in view of the testimony of plaintiff's expert that spacing would arise from usual manufacturing tolerances.” (Clk. Tr. 494).

b. The Baer Aggregation of Old Elements Is Not Patentable Since Each Element Only Provides Its Obvious Function.

The trial court held:

“With relation to the three major and distinctive features relied upon by plaintiff in support of Claims 8 and 9, defendant contends that each feature is old and may be found in the prior art, as exemplified in various patents introduced in evidence through its witness, Dirks Foster. That each of these features, if considered separately, may be said to have been anticipated by the prior art, exemplified by patents

offered in evidence seems clear, but the big and narrower question is, do these features operate independently of each other or are they so coactive as to bring a new and useful result.” (Clk. Tr. 490).

In order for a combination of elements to be patentable, the combination must provide more than the separate functions of the individual elements. *Great Atlantic & Pacific Tea Co. v. Supermarket Equip. Co.*, 340 U.S. 147 (1950); *Rohr Aircraft Corp. v. Rubber Teck Inc.*, 266 F.2d 613 (9th Cir. 1959). Stated in other words “[t]here is no invention in a ‘mere *aggregation* of a number of old parts or elements’, nor in the *accumulation* of old devices which do not in some way exceed ‘the sum of its parts’”. *Kwikset Locks v. Hillgren*, 210 F.2d 483, 486 (9th Cir. 1954 [Footnote omitted—emphasis in original].

The three features relied upon by plaintiff are the use of tongues on the point and recesses on the adaptor, a heavy upper wall on the wear-point, and spacing between the wear-point and the adaptor.

The function provided by the tongues and recesses of the Baer patent is set forth in the Baer patent (Pl. Ex. 2) at column 3, lines 4 to 7:

“... the tongues 48 are provided on the tooth point 42 to improve the lateral stability of the tooth point with respect to the adapter as well as to prevent relative movement or creeping between the tooth point and the adapter, ...”

This same function is attributed to the tongue and recess combination as shown from the Mekeel patent. Mekeel states: “This construction adds rigidity to the connection of the parts”. (Def. Ex. BB, p. 2, ll. 90, 91).

The second alleged feature of the Baer patent is the heavy upper wall or spike portion. No function is attributed to this heavy section in the Baer patent but Esco's witness, Mr. Eyolfson, testified that the purpose is to transmit forces back to the tongues where they are resisted (Rep. Tr. 199). The same function is attributed to the heavy spike or body shown in the Hosmer patent (Def. Ex. S). Referring to the spike, Hosmer states:

"The [spike] . . . 22 overlies and directly bears on the upper surface 16 of the [nose] . . . 13 when downward loads are imposed on the tooth point. The tang 26 engaging in the opening 19 effectively resists forces on the [spike] . . . 22 that tend to lift or tip the body upwardly with respect to the [nose] . . . 13" (Def. Ex. S, p. 3, col. 1, ll. 35-43).

Also, as stated by Esco's witness, Mr. Eyolfson with respect to the heavy spike portion:

"Any mechanical engineer knows if you want to stiffen up a beam, you can do that." (Rep. Tr. 624).

Here again, the normal, usual function of the element is employed.

The third feature of the Baer patent is the spacing between the wear point and the adaptor and that purpose as set forth in the Baer patent is "to allow for wear and the effects of impact against a tooth point in use" (Pl. Ex. 2, col. 3, ll. 60, 61). This same function of spacing between the wear-point and the adaptor is taught in the Mekeel '988 patent (Def. Ex. QQ). As noted previously, Mekeel states:

"By this means any wear on the contacting parts will be taken up and compensated for by further driving the tooth towards the base with no possi-

bility of the shoulders 20 or the ends of the projections 18 engaging and thereby limiting that movement.” (Def. Ex. QQ, p. 1, ll. 93-98)

Thus, not only are the individual elements of the Baer patent found in the prior art but their identical functions are likewise found. The overall function of the structure shown in the Baer patent is nothing more than the aggregation of these different functions. The tongues and recesses provide support; the heavy upper wall or spike provides sufficient strength to transfer forces; and spacing between the point and the adaptor permits the parts to remain in engagement even after wear. Neither the elements nor their function is new.

B. HENSLEY WEAR POINTS DO NOT CONFORM TO THE CLAIMS OF THE BAER PATENT AND THEREFORE DO NOT INFRINGE.

1. Esco Has the Burden of Proving Infringement of Its Patent Claims 8 and 9.

In a patent infringement action, the burden of proving infringement rests with the patentee, plaintiff. *Bates v. Coe*, 98 U.S. 31, 49 (1878); *Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.*, 151 F.2d 91 (9th Cir. 1945). There are four different Hensley points in contest—the four inch (Pl. Ex. 5), the five inch (Def. Ex. J), the six inch (Pl. Ex. 10) and the seven inch (Pl. Ex. 32). These points are known as R-4HX, R-5HX, R-6HX and 7-RHX, respectively.

Each of the Hensley points is different not only in size but in the configuration of the rearwardly extending tongues. The upper and lower edges of the four inch

point (Pl. Ex. 5) are clearly not parallel, as can be seen by visual observation. During the course of the trial these edges were measured to be at an angle of about 60° (Rep. Tr. 352). The six inch size (Pl. Ex. 10) likewise include upper and lower edges which are not parallel and which at the trial were measured to be about 35° . This non-parallelism can also be seen in the drawing (Pl. Ex. 25) showing in pencil the outline of the tongues on the Hensley R-6HX points. Although the angle of the upper and lower edges were not measured at trial with respect to the R-5HX (Def. Ex. J), it is apparent from visual observation that this angle is somewhat between that of the R-4HX and the R-6HX (Pl. Ex. 5 and 10). At the trial the upper and lower edges of the Hensley R-7HX were measured to be something between five and fifteen degrees (Rep. Tr. 665-667).

Not only are the rearwardly extending tongues different for each of the Hensley wear points but also their operation is different. Esco, in its efforts to show infringement, performed a series of tests on the Hensley R-6HX points (Pl. Exs. 9 and 10) which tests, to Esco's satisfaction at least, showed that the rearwardly extending tongues on the six inch Hensley points provided the additional stabilization as called for in the Baer patent.

Although Esco had attempted to perform the same tests on the smaller four and five inch Hensley points, it was unable to show any support as called for in the Baer patent. The testimony of Esco's witness Mr. Eyolfson is as follows in this respect:

“Mr. Herbert: Q. Did you testify that you tried to place in a guillotine test Hensley R-4 and Hensley R-5 points?

"A. Yes, I did at one time a number of years ago. I mean two or three years ago at least.

"Q. The tests were not satisfactory?

"A. Not too satisfactory.

"Q. In that they did not make contact?

"A. No, in that the points just shattered.

"Q. Did they make contact?

"A. Sure.

"Q. Upon shattering?

"A. Who's to say?

"Q. I am asking. You made the tests.

"A. Well, if you saw what it is, when you close it up and you hit it and you look at what's there when you get through, they were shattered and there was contact made. It doesn't establish anything other than the fact that contact was made. The points were broken.

"Q. But contact only with the points broken?

"A. I don't know. I wasn't able to test one that didn't break." (Rep. Tr. 663, 664)

Moreover, the district court found that:

"While the sides of tongues on the smaller sized Hensley-Esco type points may or may not be said to be substantially parallel, the sides of the tongues on the larger, seven inch, sized Hensley-Esco type points appear to be as close to substantially parallel as measurement could provide." (Clk. Tr. 484)

The court then went on to say:

"This may well account for defendant's attempt to avoid infringement by foregoing certain initial stages of stabilization in its smaller size points where added stabilization may not be needed as often. A somewhat less efficient operation does not avoid infringement." (Clk. Tr. 486)

In commenting on the tests offered by both Esco and Hensley the court again referred to Hensley's smaller sized points and stated:

“Furthermore, the Hensley tests, which were *in the main made on smaller sized points* (where the additional stabilization effect has lesser importance), were variable and impossible to evaluate.” (emphasis supplied) (Clk. Tr. 485)

Hensley's tests were *not* “in the main made on smaller sized points” but actually included the six inch size which is the only point Esco was able to test to its satisfaction (Rep. Tr. 324). Defendant's Exhibits I, J and K are of the four, five and six inch points, as tested by Hensley.

Despite this recognition of the distinctions between the large and small points, the district court summarized generally on the question of infringement:

“The court is satisfied that the tongues on the Hensley-Esco type points serve the above indicated stabilization purpose and that this is the very reason they were retained.” (Clk. Tr. 486)

With respect to the four, five and seven inch Hensley points, there has been no showing that the feature of “additional stabilization” is provided. Esco's only test to show such stabilization has been with respect to the six inch, R-6HX point. With the clear and obvious differences between the various sized points and the lack of testimony showing infringement by the R-4HX, R-5HX and R-7HX points, Esco has not even attempted to carry its burden in showing infringement of these points. The burden of proof in patent infringement rests with the

plaintiff. *Bates v. Coe*, 98 U.S. 31, 49 (1878); *Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.*, 151 F.2d 91 (9th Cir. 1945).

2. In Determining the Question of Patent Infringement the Most Essential Element is the Claims of the Patent and the Baer Claims Do Not Read On the Hensley Points.

The claims of a patent measure the invention. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405 (1908). In order for a patent to be infringed each element of the claim of the patent must be found in the accused device and the absence of one or more of the material features of the claim avoid infringement. *Lockwood v. Langendorf United Bakeries, Inc.*, 324 F.2d 82 (9th Cir. 1963); *Englehard Ind. Inc. v. Research Instrument Corp.*, 324 F.2d 347 (9th Cir. 1963).

The patent statute requires:

“The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.”

35 U.S.C. §112 (1952)

As pointed out by the Supreme Court in *White v. Dunbar*, 119 U.S. 47, 51 (1886):

“Some persons seem to suppose that a claim in a patent is like a nose of wax which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express. The context may, undoubtedly, be resorted to, and often is resorted to, for the purpose of better understanding the meaning of the claim;

but not for the purpose of changing it, and making it different from what it is. The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is: and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms. This has been so often expressed in the opinions of this court that it is unnecessary to pursue the subject further.”

The district court based its decision as to infringement on the findings that:

1.) “The defendant’s change in design and construction of its new points is insufficient to avoid its previously admitted infringement of these two claims.” (Clk. Tr. 483)

2.) “The sides of the tongues of the larger, seven inch, sized Hensley-Esco type points appear to be as close to substantially parallel as measurement could provide. Furthermore, Clyde C. Hensley did not deem angle of the sides of the tongue of any significance to him. The above described change is at most a colorable change, and as such it cannot avoid infringement.” (Clk. Tr. 484)

3.) that if, “. . . there was no reason for [Hensley’s] having the rearwardly extending tongues, why did he keep them when he made the change?” (Clk. Tr. 484)

4.) “that both Baer and Hensley-Esco type points operate in the same manner, i.e., the inwardly extending tongues provide a stabilizing function in addition to the wedge faces and thereby protect the pin from deformation and make the point removal simple.” (Clk. Tr. 485)

The only attempt to relate the Hensley points to the claims of the Baer patent appears in the appendix to the district court's opinion (Clk. Tr. 499, 500). This appendix shows only the very broadest comparison of Claims 8 and 9 of the Baer patent with one generalized Hensley wear-point. The district court did not find the various features of the Baer Claims 8 and 9 particularly in the Hensley points, R-4HX, R-5HX, R-6HX or R-7HX and consequently, there can be no infringement. *Lockwood v. Langendorf United Bakeries, Inc.*, 324 F.2d 82 (9th Cir. 1963).

3. The Hensley Wear-Points Do Not Incorporate Essential Elements of Baer Claims 8 or 9.

Claim 8 of the Baer patent recites among other elements that "said tongues having *substantially parallel side edges* adapted to fit into said recesses of the adaptor shank portion when the nose is seated in the socket, thereby to support the tooth on the adaptor in directions transverse to the wedge faces." (emphasis supplied)

The rearwardly extending tongues of the Hensley points are clearly such that their upper and lower edges are *not* parallel. As mentioned hereinabove the angle between the upper and lower edges of the R-4HX is approximately 60° and of the R-6HX is approximately 35° .

In Plaintiff's Exhibit 25 the angle between the faces of the wedge shaped nose of the adaptor is set forth as being 29° 20 minutes. Esco's own expert recognized that this angle of 29° and 20 minutes was not "substantially parallel" (Rep. Tr. 277, 278). If an angle of 29° and 20 minutes is not substantially parallel, it is obvious that the even steeper angles of 35° and 60° are not substan-

tially parallel. As a matter of fact, the angle of 60° between the upper and lower surfaces as shown in the R-4HX is more closely akin to perpendicularity than to parallelism.

It is axiomatic that a patentee in an infringement suit may not take a position inconsistent with the one he maintained before the Patent Office in proceedings which led to the issuance of a patent. *D & H Electric Co. v. M. Stevens Mfg. Inc.*, 233 F.2d 879 (9th Cir. 1956); *Cutter Laboratories Inc. v. Leophile-Cryochem Corp.*, 179 F.2d 80 (9th Cir. 1949). But this is exactly what is necessary in order to find that Hensley type points infringe the Baer patent claims in issue.

In the very paper in which the Baer patent Claims 8 and 9 were presented to the Patent Office, Baer's attorney commented upon the earlier Seal patent (Def. Ex. R) as follows:

"The Examiner has apparently relied upon the disclosure of the Seal patent to indicate the use of tongues on the side of a tooth point. It is to be observed that the side *tongues of Seal would be useless in the applicant's disclosed structure, because they are wedge-shaped and*, consequently, could not be made to maintain engagement for reinforcing purposes during any longitudinal movement of the tooth point relative to the adapter." (Def. Ex. M, p. 37) (emphasis supplied)

Referring to the Seal patent (Def. Ex. R), Figure 1, the wedge-shaped nature of the rearwardly extending tongues is apparent. Esco and Baer then, have admitted that angles as shallow as $29^\circ 20$ minutes are wedge shaped and not substantially parallel. Further, they have

admitted that wedge shaped tongues will not work in the Baer excavating tooth. But the findings of the district court require that these admissions and facts be ignored and hold that deviations of as much as 60° are not only "substantially parallel" but also fulfill the function as set forth in the Baer patent. Such holding is clearly contrary to the opinion of this Court in *D & H Electric Co. v. M. Stevens Mfg. Inc.*, 233 F.2d 879 (9th Cir. 1956), where in a situation quite similar to the instant case, a deviation of from 1 to 5 degrees from being "substantially at right angles" was held sufficient to avoid infringement in view of statements made in the Patent Office prosecution. In *D & H Electric*, at 883 it was stated:

"At this time, argument was made on behalf of the applicant (appellants' assignor) that of prime importance in the invention was the fact that the ribs were not convolutions, but were at right angles to the major axis. Prior art had ribs arranged as convolutions in screw threads, either continuous or interrupted, and the file wrapper shows that applicant strongly delineated between such screw threads and the ribs of his device."

and at 884:

"This case is complicated by the striking similarity of the patent in suit and the appellees' device, much of which of course is dictated by the limited function performed by the devices. Shape and dimensions are substantially, if not exactly, the same, the sole difference being that the angle of the ribs of appellants' device is 90° to the major axis, while the projections of the appellees' device vary from 85° to 89° to the major axis. Slight as this difference

may seem, it invokes an entirely different principle of operation. By reason of their right angularity, the ribs of appellants' device are not and cannot be considered screw threads, while it is equally obvious that by their 1° to 5° variation, the projections of appellees' device can be nothing other than interrupted screw threads. Thus, as pointed out in appellees' brief, the purpose of the accused device is to more or less *fit* the conduit, while the purpose of the patent in suit is to misfit the conduit in affecting the coupling." (emphasis in original)

Claims 8 and 9 also require and recite that the rearwardly extending tongues are "adapted to fit" into the recesses of the adaptor. Although this fitting together of the wear-point and adaptor is, in reality, an element of the combination of point and adaptor (Claims 8 and 9 are directed to the wear point alone) this too was heavily relied upon by Baer during the Patent Office prosecution.

In support of patent Claims 8 and 9, Baer's attorney stated:

"It is further to be noted that the side tongues on the tooth point are of a length such that they do not normally seat at the ends of the recess in the adapter shank. Thus, while the tooth point may move longitudinally of the adapter nose to maintain seating engagement of the wedge surfaces, the parallel edges of the *tongues remain in engagement* with the edges of the recess without interfering with the longitudinal seating of the tooth point on the adapter nose.

"The three claims now under consideration are particularly devoted to a tooth point *having specific structural details for effecting the maintenance of*

the seating engagement between the co-acting wedge and tongue surfaces of an adaptor, so that the aforementioned advantages are attained." (emphasis added) (Def. Ex. M, p. 36)

This fitting relationship between the point and the adaptor was added only after the Patent Office had refused to allow claims without such relationship. Patent application Claims 6 and 7 (Def. Ex. M, p. 14) did not refer to the adaptor at all. But even after repeated attempts to obtain allowance of Claims 6 and 7, they were finally canceled and new claims were added. The new claims recited the "fitting" relationship and eventually issued as patent Claims 8 and 9 here in issue.

Where the broad claims in a patent application are limited by amendment during the course of prosecution, the claims allowed in the patent cannot be construed to cover that which the amendment eliminated from the patent. *Exhibit Supply Co. v. Ace Patents Corp.*, 315 U.S. 126, 136 (1941); *Schriber Schroth Co. v. Cleveland Trust Co.*, 311 U.S. 211 (1940); *Moon v. Cabot Shops*, 270 F.2d 539 (9th Cir. 1959).

Baer having defined what he means by the fitting relationship of the tongues and recesses and having urged this interpretation on the Patent Office, Esco cannot now broaden the scope of the claims beyond that originally urged on the Patent Office.

Thus the Baer patent Claims 8 and 9 require fitting relationship between the tongues of the wear-point and the recesses of the adaptor. This relationship is not present in the Hensley points and there has been no showing of such interfitting relationship. In fact, the evidence

showed that there was actually a space between the rearwardly extending tongues of the Hensley points and the recesses in the Esco adaptor (Rep. Tr. 178, 344).

The Hensley points not having rearwardly extending tongues which have “substantially parallel” upper and lower edges and which “fit” into the recesses of the adaptor—no infringement can be found.

4. Hensley Wear Points Do Not Infringe Because They Do Not Have Tongues and Recesses Which Provide Support.

The mere finding that every element of a claim exists in an accused device (and this has not been found here) is not, in and of itself, determinative of the question of infringement. In the words of this Court in *Grant v. Koppl*, 99 F.2d 106, 110 (9th Cir. 1938):

“We note that appellant contends that the claims of the patent in suit read upon appellee’s device. . . . But infringement is not a mere matter of words.”

Before infringement is proved, it must be shown that the accused device must utilize substantially the same structure, operating in substantially the same way to produce substantially the same result as the structure of the patent. *Pursche v. Atlas Scrapper & Eng’r Co.*, 300 F.2d 467 (9th Cir. 1961); *Filter Corp. v. Amen Atiyeh*, 216 F.2d 443 (9th Cir. 1954).

Esco has conceded this in admitting that without support between the tongue and recess there is no infringement (Rep. Tr. 453). It must then prove that support exists.

Such identity of function has not been shown by Esco. With respect to the four, five and seven inch Hensley

points, Esco has not offered any testimony at all on the stabilizing function of the tongues.

With respect to the Hensley six inch points the only evidence offered by Esco is its *laboratory* tests wherein the forces applied were magnified three times greater than those actually encountered in usage. Esco's expert on the laboratory test, Mr. Eyolfson, testified that six thousand foot-pounds is a normal test in the guillotine unit used (Rep. Tr. 63). But the Hensley points (Pl. Exs. 9 and 10) were tested on the guillotine not at six thousand foot-pounds, the normal test, but rather at sixteen thousand foot-pounds and at eighteen thousand foot-pounds, respectively (Rep. Tr. 65-67).

There was no attempt to show any supporting function of the Hensley tongues at the normal testing operation (Rep. Tr. 76). The question of infringement cannot be determined by laboratory tests which amplify the operational characteristics far in excess of what was contemplated for the structure of the Baer patent. *U. S. Slicing Mach. Co. v. Wolf, Sayer & Heller, Inc.*, 243 Fed. 412 N.D. Ill. 1017) *aff'd* 257 Fed. 93 (1919).

There has been no evidence at all to the effect that the Hensley points, in normal field usage, would provide the stabilizing function called for in the Baer patent. Esco having failed to provide any proof that the Hensley structure performs the function of the Baer patent, infringement cannot be found.

CONCLUSION

For the foregoing reasons, Claims 8 and 9 of the Baer patent should be held invalid and not infringed and the judgment below should be reversed with instructions to dismiss the Complaint.

Dated, San Francisco, California,
June 22, 1966.

Respectfully submitted,

FLEHR AND SWAIN

THOMAS O. HERBERT

Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

THOMAS O. HERBERT

Attorney for Appellant

(Appendix Follows)

Appendix.



Appendix

LIST OF PLAINTIFF'S EXHIBITS

Description	Identified	Offered	Received	With- drawn
1. Plastic replica of Baer tooth	61	61	61	
2. Softy copy of patent in suit, 2,483,032	43	44	44	
3. Wooden model of ESCO R-6 point	60	60	60	
3A. Photo of Exhibit 3	60	60	60	
4. Hensley R-4HX ESCO Type point (1960)	116	116	116	
5. Hensley R-4HX ESCO Type point (1961)	116	116	116	
6. Film	126	126	127	
6A. thru 6P. Photos from above movie film	128	128	128	
7. Baer point	62	129	130	
7A. Photo of Exhibit 7	130	130	130	
8. Baer point—without tongue	64	130	130	
8A. Photo of Exhibit 8	130	130	130	
9. Hensley 6" point	64	131	131	
9A. Photo of Exhibit 9	132	132	132	
10. Second Hensley 6" point	64	131	131	
10A. Photo of Exhibit 10	132	132	132	
1. Copy of Hensley Invoice 2899	116	116	116	
2. Hensley Brochure—1960	116	116	116	
3. Hensley Brochure—1961	116	116	116	
4. C. C. Hensley deposition, 10/4/61	117	117	205	
5. Deposition of Ruston Hensley, 5/27/63	117	117	205	
6. Hensley Brochure	117	117	117	

PLAINTIFF'S EXHIBITS CONTINUED

	Description	Identified	Offered	Received	With- drawn
17.	Deposition of Clyde C. Hensley, 5/27/63	117	117	205	
18.	Hensley salesman's call report, 10/18	117	117	117	
19.	Depositions of Herbert F. Hales and Paul E. Rothwell	117	117	119	
20.	Hensley R-5 pin	145	146	147	
21.	ESCO shipping advice DA71797	146	146	147	
22.	Chart applying patent Claim 5 to Hensley point	147	147	147	
22A.	Reduced scale version of Exhibit 22	148	148	148	
23.	Chart applying patent Claim 8 to Hensley point	147	147	148	
23A.	Reduced scale version of Exhibit 23	148	148	148	
24.	Chart applying patent Claim 9 to Hensley point	147	147	148	
24A.	Reduced scale version of Exhibit 24	148	148	148	
25.	Copy of ESCO drawing DC3595—colored	214	215	216	
26.	Model of Dipper	70			148
27.	Model of Bucket	97			148
28.	Model of clam shell	98			148
29.	Block of metal as part of tests ran	306	306	306	
30.	Drawing and angle measurement made by Mr. Hensley	389	391	391	
31.	Enerusted tooth from Kaiser	577	602	602	
32.	Seven inch Hensley point	599	602	602	

LIST OF DEFENDANTS' EXHIBITS

	Description	Identified	Offered	Received	With- drawn
A.	ESCO R-3 point	121	121	121	
1.	Packing list, Marshall Newall, re Ex. A	121			121
2.	Greyhound Bus bill re Ex. A	121			121
3.	ESCO R-34S point	121	121	121	
1.	Packing list, Marshall Newall, re Ex. B	121			121
2.	Invoice, Marshall Newall, re Ex. B	121			121
.	ESCO WRR-34 Adapter	122	122	122	
1.	Packing list, Marshall Newall, re Ex. C	122			122
9.	CAT tooth	122	122	122	
.	Hensley R-4HX point (colored)	123	123	123	
1.	Hensley pin for R-4HX	124	124	124	
2.	ESCO adapter R-4	122	122	122	
.	Pattern Hensley R-4HX point	124	124	125	
.	Pattern Hensley R-6HX point	125	125	125	
1.	Motion picture, testing of Hensley points	126	127	127	
.	Tested & rupture Hensley R-4HX point	133	133	133	
.	Tested & ruptured Hensley R-5HX point	133	133	133	
1.	Tested Hensley R-6HX point	133	133	133	
.	Five worn Hensley R-6HX points	133	133	134	
1.	Certified copy of Baer file wrapper	134	134	134	
.	Thomas patent 915,809	134	134	134	
.	Berryman patent 957,030	134	134	134	
.	Mederios patent 1,014,891	134	134	134	
.	Van Buskirk patent 1,925,420	134	134	134	

DEFENDANTS' EXHIBITS CONTINUED

	Description	Identified	Offered	Received	With- drawn
R.	Seal patent 2,134,344	134	134	134	
S.	Hosmer patent 2,251,487	134	134	134	
T.	Crawford patent 2,259,456	134	134	134	
U.	Crawford patent 2,307,359	134	134	134	
V.	Crawford patent 2,312,802	134	134	134	
W.	White patent 2,325,991	134	134	134	
X.	Harrell patent 1,126,759	134	134	134	
Y.	McMonegal patent 1,384,701	134	134	134	
Z.	Meyer patent 1,722,154	136	136	136	
AA.	McKee et al. patent 1,780,397	136	136	136	
BB.	Mekeel patent 1,845,677	136	136	136	
BB1.	Certified copy of Mekeel file wrapper	136	136	136	
CC.	Terry patent 2,279,960	136	136	136	
DD.	British patent 565,417	136	136	136	
EE.	Colored Chart, Baer 2,483,032, Figs 6-10	136	137	137	
FF.	Model of Baer 2,483,032	137	137	137	
GG.	Colored chart of Hensley R-4HX point on ESCO R-4 adapter	137	137	137	
HH.	Chart comparing Baer Claim 8 with Mekeel	137	531	531	
II.	Colored chart showing Mekeel drawing	138	138	138	
JJ.	Colored chart showing Mekeel drawing, altered	138	531	531	
KK.	Model of Mekeel	138	531	570	
LL.	Chart of patents showing spacing to be old	139			570
MM.	Chart of patents showing heavy spike to be old	139			570
NN.	Chart comparing Baer Claim 9 with Mekeel	139	531	531	
OO.	Chart comparing Baer Claim 5 with Mekeel	139	531	531	
PP.	Chart of patents showing resilient block and key to be old	139	139	139	570
QQ.	Mekeel patent 1,951,988	140	140	140	
TT.	Drawing made by Mr. Hensley	355	355	356	

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No. 20,599

In the

United States Court of Appeals

For the Ninth Circuit

HENSLEY EQUIPMENT COMPANY, INC.,
Appellant,

vs.

ESCO CORPORATION,
Appellee.

Appellee's Brief

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No. 20,599

In the
United States Court of Appeals
For the Ninth Circuit

HENSLEY EQUIPMENT COMPANY, INC.,		Appellant,
vs.		
ESCO CORPORATION,		Appellee.

Appellee's Brief

Because appellant (Hensley) failed (1) to set down the facts chronologically and (2) to summarize the testimony of the witnesses, appellee (Esco) must controvert appellant's statement, as follows:

I.

STATEMENT OF FACTS

A. What the Prior Art Was

The two-piece teeth with which the case is concerned go back at least to 1909 (Defendant's Exhibit N, R. 134). It was long recognized that the sharp tip would wear—so that it would be wise to just replace the smaller tip (hereinafter called “point”), rather than the whole tooth. Notwithstanding many efforts from the turn of the century

up to World War II to make a two-piece tooth, none became commercially available (R. 46, 151, 197).

Making the tooth in two parts required some means for fastening the two together. This created a dilemma that persisted until the Baer invention. The fastening means had to perform two purposes—which for years seemed to be poles apart. First, the fastening means had to be easily removable—otherwise the idea of a replaceable point was wasted. If the fastening means were too-easily removable, the parts could become disengaged in operation (R. 197, 299).

Loss of the point during digging meant that the adapter would have to bear the brunt of the digging—something it was never intended to do. Adapters have to be softer than points to transmit rather than resist shock and abrasion. If the adapter becomes deformed, it could not receive a new point. Thus, the whole benefit of having a two-piece tooth was lost.

All four witnesses in Plaintiff's direct case were conversant with the excavating art prior to the Baer invention. Three, Eyolfson, Graf and Wilcox are registered professional engineers. The fourth, Bremner, had wide experience in operating excavating equipment. Bremner added one exception to the testimony of the other three that prior to Baer, only single-piece teeth were used.

“Q. Any two-piece teeth?

A. Oh, there was somebody out there with a two-piece tooth. I would not say what brand or particularly remember what it looked like, perhaps. It could have been something on the order of an H & L drive-on fit.

Q. I hand you now Hosmer Patent No. 2,251,487, Defendant's Exhibit S and ask you if your recollection is along the line of that patent shown?

A. Well, this basically is a drive-on, wedge-type fit where you have got a triangle or a cone in which you

are driving a tooth. Yes, this could be. This would perhaps be more applicable to smaller items rather than the larger machines.

Q. Do you notice also the indented sides or crimped or dimpled sides? Does that square with your recollection of what you saw back in those days?

A. That could be. I couldn't swear to that at all.

The Court: Let me see that.

Mr. Fallon: How are these teeth removed or the points removed from the teeth?

A. Brute strength or else with a welding torch. When I say brute strength, that would be the sledge hammer and chisel." (R. 295-6).

Hosmer is seen in Defendant's Exhibit S (R. 134) on which Hensley relies (Appellant's Brief—page 46). Hosmer and each other patent advanced by appellant were issued at a time when those in the excavating art stayed with single-piece teeth—notwithstanding the economies available from two-piece teeth (R. 294, 300).

"The commercial value of such excavating teeth lies in the fact that the point can be easily fitted on to the adapter, maintained securely thereon during the heavy stresses encountered in field operations and yet readily releasable for replacement when worn down or when it otherwise becomes time to replace the point. The resultant savings in man hours and metal have been a boon to the heavy construction industry."¹

1. The foregoing quotation was taken from page 2 of the Trial Court's Opinion. This Opinion, which embodies the Findings of Fact and Conclusions of Law, is reproduced as an Appendix hereto for ease of references. Inasmuch as the printing of the Opinion does not correspond to the typewritten paging, the printed version in the Appendix is keyed to the clerk's transcript, the foregoing excerpt, for example, being taken from page 475. Hereinafter, references to the Court's Opinion will follow the designation suggested by appellant, viz., (Clk. Tr. 475). The other references are to the reporter's transcript and in accordance with usual form are merely designated (R.).

B. What the Patentee Did

According to the patent, the nose of the adapter is wedge-shaped, having converging faces. The point has a rearwardly-facing socket defined by similar wedge faces, so that the point can seat on the adapter nose. The upper portion of the point is relatively thick or heavy to constitute a spike portion. Rearwardly of the point are provided integral tongues which fit into recesses provided on the adapter. The mating portions of the point and adapter are arranged so that the point can move rearwardly on the adapter as wear occurs on the seating or bearing faces of the nose and socket. For this purpose, spacing between the socket apex and the nose is provided, as also is a spacing between the rear ends of the recesses and the rearwardly-extending tongues (Pl. Exh. 2, R. 213).

When the adapter has its rear or shank portion secured to the lip of a piece of excavating equipment, the tongues serve to stabilize the point against transverse stresses. This provides stabilization in addition to that provided by the wedge faces. In so doing, the tongues serve to protect the locking pin against deformation (R. 201). Even under heavy transverse stress, the pin is merely used to oppose gravity to keep the point from falling off the adapter (R. 56). Thus, there is no deforming stress applied to the pin which would make it difficult to remove when point replacement becomes necessary (R. 102). Because of this, four points of the patent type can be replaced within five minutes (R. 56).

The spike portion of the point is normally stressed at its tip, and the type of stress that would tend to deform the pin is a transverse stress, *i.e.*, one at right angle to the length of the spike portion (R. 51). These transverse forces can reach upwards of 10,000-20,000 foot-pounds (R. 53-54). When transverse forces of this order are applied

to the tip of the point spike portion, the spike portion acts as a cantilever to transfer the stress to the rear of the point, using the adapter nose as a fulcrum (R. 155, 199). In operation under destructive stresses applied transversely of the spike portion, the point, while deflecting, moves forward slightly, movement which is made possible by the spacing provided between the point and the adapter so that the tongues can come into bearing engagement with the walls of the adapter recesses. The tongues fit within the adapter recesses with substantially parallel edges, with a sliding fit in order to accommodate wear on the wedge bearing surfaces (R. 213). Deflections of the order of $1\frac{1}{2}$ inches are not uncommon at the spike portion tip where they are transmitted in lever fashion by means of the heavy spike portion to the tongues so as to prevent deformation of the locking pins (R. 620).

Thus, to additionally stabilize the point on the adapter—so as not to deform the securing pin, Baer made use of three features—(1) a heavy spike portion on the point top which acted as a lever to cause the shock load to “leap frog” the pin and be taken up by (2) rearwardly-extending tongues which, because of the point contour was (3) spaced from the adapter to permit the tongues to engage recesses in the most stalwart portion of the adapter.

Appellee, Esco Corporation, marketed excavating teeth made according to the Baer patent starting about 1945. The Baer-type excavating teeth enjoyed an immediate and widespread commercial success (R. 300). Licenses under the patent were taken by such principal tooth manufacturers as American Steel Foundries, now Amsted Industries, the American Manganese Steel Company Division of American Brake Shoe Company, and Caterpillar Tractor Company (R. 215).

For the purpose of testing excavating teeth, Esco Corporation initially used a 3,000-ton press, but the results were erratic (R. 623). Paul Eyolfson, Manager of Expendable Products of the Construction Equipment Division of Esco Corporation, gathered data on tooth failures in the field and developed a testing device in the nature of a guillotine for duplicating field failures (R. 622, 637). This testing machine was and is used in the ordinary course of business to test teeth for minimum performance, and over the years for a six-inch Baer-type tooth an impact resistance of 6,000 foot-pounds was determined to be a satisfactory minimum (R. 63).²

C. Hensley Activity

The business of the appellant, Hensley, is to sell replacement parts for the construction industry, having started this in 1947 (R. 164). Appellant's chief executive officer is Clyde C. Hensley, who prior to 1947 had no experience with the use and operation of excavating teeth (R. 168-9). In 1948, Hensley started making replacement points for the teeth of other manufacturers: Caterpillar, H & L, Ateco, and Sabre. In 1960, Hensley started making replacement points for the Baer-type excavating teeth of Esco. For this purpose, Hensley purchased five Esco two-part teeth (points and adapters) in order that it might "capture the dimensions" that are necessary to fit its manufactured Esco-type points to the Esco adapters (Clk. Tr. 476). Hensley knew about the patent from the fact that the copied points car-

2. The pin is not stressed all the time and may not be stressed at all in some easy working conditions. However, the tooth has to be capable of meeting any type of digging stress, and the function of the combination of the spike, rearwardly-extending tongues and spacing can be analogized to that of a man's suspenders. With the fitting of pants, the suspenders perform no function most of the time but are available and helpful at times of extraordinary stress

ried the number of the patent in suit (R. 171, 173). One hundred nine of the copied points, of all sizes, were made by appellant (R. 318). The joint pre-trial statement of March 13, 1964, admitted as an undisputed fact:

“That Defendant has manufactured a small number of points as defined in claims 8 and 9 of the patent in suit, and that these points infringe said claims if the claims are valid.” (Clk. Tr. 477).

After it was cautioned against manufacture of infringing points, Hensley changed the shape of the rearwardly-extending tongues to provide just a $\frac{1}{8}$ inch clearance between the tongues and recesses in which they are received when in use (R. 180). This can be graphically visualized by comparing Pl. Exh. 12 and 13, which are brochures of the first and second versions (Appendix page 1).

No field tests or other operational tests were performed to determine the function of the changed tongues (R. 180). When questioned about the differences in the manufacture of these two items, Mr. Hensley testified as follows:

“The Court: And you are familiar with differences in the manufacture of 12 and the manufacture of 13?

The Witness: I am, your Honor.

The Court: Would you tell us what those differences are?

The Witness: In Exhibit 12, the ears were somewhat square in shape and in Exhibit 13 they were more of an extended shark fin without parallel sides.

The Court: Other than the ears, is there any difference in those two manufactures?

The Witness: No sir, not any difference whatsoever.” (R. 174).

In the initial production which was copied from the Esco commercial construction, Hensley applied integral wedges or fin-like projections to the sides of the points (Pl. Exh.

4). These fins did not extend over the portion of the points carrying the tongues—the points being faithful copies of the Esco commercial construction (Pl. Exh. 4). When the shape of the tongues was changed to yield the $\frac{1}{8}$ inch spacing, the fins (designated “shark fins” by Hensley) were extended so as to be co-extensive with the changed tongues (R. 175-6). In this fashion, the horizontal dimension of the tongue was increased, while the vertical dimension was decreased (Pl. Exh. 5, R. 176).³

Hensley admitted to the stabilizing function of the rearwardly-extending tongues (R. 182). Further, Hensley admitted that there was no difference in the operation of the Hensley and Esco points (R. 182-3). The change in tongue shape was merely Clyde C. Hensley’s “intuition” (Pl. Exh. 14, page 23). Still further, Hensley did not deem the angle of the sides of the tongues to be of any significance (R. 354).

D. Pre-Trial Activity

Esco brought suit in March of 1961. In October, 1961, the deposition of Clyde C. Hensley was taken. In it, he could give no reason for the particular shape of the changed tongues and more particularly the extension of the shark fin (Pl. Exh. 14 at page 49). In September, 1962, depositions of employees of Hensley’s eastern distributor, W. M. Hales Company, Inc., were taken. These showed that the distributor was selling the point and adapter combination thus infringing claim 5 of the patent. However, the Court found that this activity could not be attributed to Hensley.

3. “While the ‘shark fin’ structure on the outside of the tongue sides of the Hensley-Esco point may have some value for the purpose of throwing or sweeping away aggregate in a digging operation, the subsequent change in the Hensley-Esco tongue with an extension of the shark fin so as to make it co-extensive with the tongue merely resulted in a change in appearance (R. 174), and in no way aided the operation of the shark fin. . . .” (Clk. Tr. 484).

Thereafter, Elseo tested a number of points on the above-mentioned guillotine which were shown to the Court as well as the film showing the testing procedure (Pl. Exh. 6-10). The object of the tests was to determine whether Hensley points had impact resistance equal to that of the Baer patented point—whether the teeth were sufficiently stabilized so that pin removal was easy (R. 202, 621).

The first point tested was a replica of that shown in the patent (Pl. Exh. 7). Even at a stress of 500 foot-pounds (well below the 6,000 foot-pounds minimum for this size point) there was movement of the point relative to the adapter of $1/16$ - $1/8$ inch (R. 62-3). The point patterned after the patent was satisfactorily used up to and including 16,000 foot-pounds with no deformation in the pin, no damage to the adapter and with the pin readily removable (R. 62-3, 577).

A point like the point shown in the patent, but without the rearwardly-extending tongues, was tested and found to move $1/4$ inch at 500 foot-pounds, and at 3,000 foot-pounds, the pin bent double (Pl. Exh. 8, R. 63-4). This demonstrated the advantage of having the rearwardly-extending tongues to protect the pin against deformation so as to maintain the point readily removable irrespective of stress (R. 56). Next tested were two six-inch Hensley points, and each of these was readily removable from an impacted but undamaged adapter, after stresses of 16,000 foot-pounds (Pl. Exh. 6 and 10, R. 65-8).

In each of the tested points (Pl. Exh. 7-10), the stress was applied at the tip of the point and generally transverse thereto— 85° (R. 95), thereby simulating heaviest field loading (R. 54). In each of the cases of the tongue-equipped points, there was a noticeable “peening” or scarring of the surfaces of the tongues where they came in contact with the walls of the adapter recesses (R. 156-58). In this fashion,

the tongues functioned to protect the pins from deformation and made point removal simple.

The type of test employed is significant as was admitted by both sides at the trial—only a dynamic test, one approximating actual field conditions, was reliable (R. 449).

Hensley performed only a static test on its points at the Stonehurst Machine & Foundry Co. in Oakland (Def. Exh. H), to see whether the tongues would make contact with the walls of the recesses (R. 322). No load was applied to the tips of any of the three points tested, and, as a matter of fact, the loading on the point was moved successively rearwardly as the point size increased (R. 378-384, 571). The loading was artificial, having no relation to stress application in the filed of operation (R. 574, 579). In the case of the four and five-inch size Hensley points, the points shattered in the box section (Def. Exh. I and J) while in the six-inch size, (Pl. Exh. K) where the loading was about the fulcruming point, (R. 574), the nose failed in compression. In the four and five-inch points, there was peening or cold working of the rearwardly-extending tongues (R. 329, 340).⁴

4. "Of the two tests, the Court finds the plaintiff's guillotine test (a dynamic test) to be by far the more reliable and as close to normal severe operations as a test could come. The Hensley tests, which were designed by an employee who has a PH.D. degree in electricity and metallurgy (R. 376), but who was not present at the trial, were run by Clyde C. Hensley, whose competence as an engineer does not approach that of Eyolfson and Graf, who ran plaintiff's tests. Furthermore, the Hensley tests, which were in the main made on smaller-sized points (where the additional stabilization effect has lesser importance), were variable and impossible to evaluate. The Hensley tests failed to place the load (stress) on the tip of the tongue where it should properly have been placed, in order to simulate stress applications found in field operations, while in plaintiff's tests the load was placed on the tip of the point and generally transversely thereto, thereby simulating heaviest field loading." (Clk. Tr. 485).

E. Summary Judgment Hearing

A Motion for Summary Judgment based on invalidity and non-infringement was argued from 10:30 in the morning until 4:00 in the afternoon of February 3, 1964, before the Hon. William T. Sweigert. This followed extensive briefing and the presentation and description of various exhibits during the course of argument. The motion was denied. Judge Zirpoli excerpted part of the reported argument before Judge Sweigert and incorporated the same as part of his Opinion (Clk. Tr. 489-490).

F. The Trial

At the trial of the lawsuit, which consumed four days, Esco's first witness was Paul Eyolfson, an Esco employee and a registered professional engineer who designed and operated the guillotine in the ordinary course of business (R. 62, 622). The witness Eyolfson testified from personal knowledge of the excavating point field in the period 1941-45 wherein only single-piece teeth were employed (R. 46). The guillotine test performed by the witness on plaintiff's exhibits 7, 9 and 10 show that the Hensley and Baer points operated in the same way, *i.e.*, the rearwardly-extending tongues provide a stabilizing function in addition to that provided by the wedge faces. He further stated that this guillotine test was as close to normal severe operations as a test could come (R. 67-8) and also that the tongue surfaces need not be parallel to provide the stabilizing function (R. 107).

Esco's second witness was Professor Sam H. Graf, retired head of mechanical engineering at Oregon State College and also a registered professional engineer, who testified from personal knowledge that the excavating teeth used prior to World War II on such jobs as the Bonneville project and Grand Coulee Dam were all single-piece teeth (R. 151).

He further testified that the action of plaintiff's exhibits 7, 9 and 10 under testing was identical (R. 157). Still further, the test simulated field conditions the points would have to withstand, conditions that would make points difficult to remove if the pin became deformed (R. 161-2).

Esco's third witness was the above-mentioned Clyde C. Hensley, called as an adverse witness, who admitted that the tongues become larger in the Hensley-Esco style points as the size becomes larger (R. 178), and that stabilization becomes more important as size increases (R. 371).

Esco's fourth witness was John M. Wilcox, Esco's employee and a registered professional engineer, who testified from personal experience of the problems facing the skilled art worker in the period 1940-45. This witness also applied the language of claims 8 and 9 to the defendant's points to show that for each element specified in the claim, there was a corresponding element or portion in the defendant's smallest construction—the 4" size (Pl. Exh. 5, R. 208-09).

The last direct case witness for Esco was John Bremner, a man with wide practical experience in large earth-handling operations such as the Bayonne dry dock, Red Hill-Pearl Harbor Tunnel, Camino Dam, Ice House Dam, Union Valley Powerhouse and the Kitimat Development (R. 293). Mr. Bremner testified to the commercial success of the Baer patented tooth and the fact that the point was the first commercially-available point which was readily removable from the adapter even when powerful stresses had been applied to it.

Hensley's case consisted of two witnesses, Clyde C. Hensley, president of the appellant, and Dirks B. Foster, a patent lawyer. The witness Hensley described appellant's test as shown in a film (Def. Exh. H). The witness Foster discussed the patent in suit, the file wrapper of the patent (Def. Exh. N) and a large number of prior art patents,

all of which had been before the court on Motion for Summary Judgment, with the exception of Mekeel No. 1,951,988. (Def. Exh. QQ). The witness Foster admitted, however, that the relevant showing in Defendant's Exhibit QQ was the same as that in Defendant's Exhibits S, V and BB, which had been before the court previously (R. 537).

Esco's rebuttal case included testimony by the witnesses Graf and Eyolfson about the unrealistic character of the defendant's test (R. 574, 611). A further rebuttal witness was Halle Robb, who testified to the character of the earth-working operation using Hensley teeth at Pleasanton and who further identified a 7" Hensley-Esco style point wherein the size of the tongues was admitted to be as close to parallel as measurement could provide (R. 666, 353, Pl. Exh. 32).

II.

ISSUES

Two real issues are presented—these being more specific than those presented by appellant at pages 23 and 24 of its brief.

(1) Is the Baer patent valid over Mekeel patent No. 1,845,577?

(2) Is the patent still infringed by points with the slightly-changed tongues?

III.

SUMMARY OF ARGUMENT

Validity is determined by what would have been obvious to one of ordinary skill in the art at the time the invention was made. Even though various elements were in the art, no one saw any reason for combining them and, in fact, the history of the art argued against the combination for the purpose of making the first truly operational two-piece

tooth. Appellant's principal reference Mekeel not only lacks any indication of the importance of using these elements conjointly to make an operational two-piece tooth, but (1) lacks the elements and (2) introduces a locking mechanism that would lead the skilled art worker to assume that the Baer combination would not work.

Infringement is determined by the claims. Here he have a thrice-repeated admission that the initial versions (all four sizes) infringe so that the Court has only to look to the extent of the difference between the initial and second versions. By slightly reducing the size of the tongues (removing $\frac{1}{8}$ ") all that resulted was a slight loss in efficiency.

IV.

ARGUMENT

A. Invalidity Over Mekeel

1. HOW EFFECTIVE MEKEEL WAS AS A PRIOR ART TEACHING

Hensley relies almost exclusively on the Mekeel Patent No. 1,845,677, to anticipate the Baer patent in suit. No other prior art patent is mentioned in the specification of errors relied upon. However, this was not the case at the trial as can be appreciated from the following excerpt from Judge Zirpoli's Opinion:

"Of the fifteen patents on two-piece teeth brought to the attention of the Court by the Defendant, only one came into commercial use prior to World War II, and this required time-consuming burning or battering to remove the replaceable point (R. 296)." (Clk. Tr. 486)

To show that the invention is "obvious", Hensley has cited 15 patents. When so many patents are resorted to, there is a bolstering of the presumption of validity. *Reynolds v. Whitin Mach. Works*, 167 F.2d 78, 83-84 (4th Cir., 1948):

"Defendant has cited 21 patents as basis for its contention that complainants' invention is lacking in novelty; and this in itself is evidence of the weakness of the contention . . . *Patents for useful inventions ought not be invalidated and held for naught because of such excursions into the boneyard of failures and abandoned experiments.*" (Emphasis supplied). Accord: *Minneapolis-Honeywell Reg. Co. v. Midwest Inst. Inc.*, 298 F.2d 36, 38 (7th Cir., 1961).

Mekeel was not even the two-piece tooth that was used with removal by "burning or battering". That "burned or battered" tooth was made according to Hosmer Patent No. 2,251,487 (R. 298). Nonetheless, the appellant would lead this Court to believe that the trial court erred in:

"14 . . . construing said Mekeel patent No. 1,845,677, such as to find that it was never utilized and that no known manufacture resulted from which its effectiveness could be evaluated."

There was no testimony as to any use of the Mekeel structure, only testimony that it was *not* used (R. 580).⁵

5. Appellant's contention about the use of Mekeel is at distinct variance to the representations made to Judge Sweigert during the hearing on the Motion for Summary Judgment (pages 26, 31-32):

"The Court: Have you got exemplars of these?

Mr. Herbert: You mean physical—?

The Court: Yes.

Mr. Herbert: No, your Honor, I do not have. I do not know that Mekeel has ever actually constructed these.

* * *

The Court: Have you got anything except drawings to show Mekeel?

Mr. Herbert: No, your Honor, I do not. The drawings, the very patent itself which is before the Court is Exhibit C.

The Court: There is no embodiment of Mekeel, Mr. Herbert?

Mr. Herbert: No, your Honor, not that we know of. Mekeel was a private individual. According to his patent, he didn't assign it to any corporation or anything and this was quite some time ago, in 1932 this patent was issued."

The fact of use or non-use of a patent has a distinct bearing on what the prior art was. *Artmoore Co. v. Dayless Mfg. Co.*, 208 F.2d 1, 4 (7th Cir. 1953):

“It is unrealistic to reason that Rogers did nothing more than might be expected of a skilled art mechanic, when neither the owner of such prior art patents nor any member of the public after their expiration discovered their teachings were worth reducing to practice. Especially this is true in view of the fact that the field was wide open and that Rogers was the first to disclose a sponge-rubber mop with a wringing attachment, which was placed in manufacture and on the market. The wide acclaim with which it was received by housewives is proof of its utility and it leaves some indication of its novelty. While those of the prior art disclosed without result, Rogers reduced his disclosure to practice, and with success.”

Mekeel is not the type of reference Hensley would have it be. Here it should be appreciated that defendant's burden of showing invalidity is through a prior art which:

“... was at the time adopted or followed, to an extent sufficient to create a well understood, if not an established practice, capable at any time of being resorted to, and not something incidental, indefinite and fugitive, which is hunted up and brought forward simply for the purpose of defeating the patent . . . *Cantrell v. Wallick*, 117 U.S. 689, 695, 6 S.Ct. 970, 29 L.Ed. 1017.” *Kraft Foods Co. v. Walther Dairy Products*, 118 F Supp. 1, 15 (W.D. Wis., 1954).

2. WHAT MEKEEL DOES SHOW — GENERALLY

Mekeel is alleged to show the three elements in the Baer patented point which co-act to stabilize the tooth against pin deformation. These elements are the relatively heavy spike portion, the rearwardly-extending tongues, and the shape of the point sockets so as to provide a discrete

spacing between certain sections of the point and adapter. These are present in a non-reversible type point—one that cannot be reversed top for bottom.

The first thing that is lacking in Mekeel is the relatively heavy spike portion. In Baer, the spike portion is clearly indicated at 43 (Clk. Tr. 501-02). The Baer point has its topside considerably heavier than the bottom side and this necessarily results in an asymmetrical point. One consequence of this is that the point cannot be reversed—the top placed on the bottom. This fact was found by the trial court (Clk. Tr. 494).⁶

Mekeel has to do with a reversible type point—one inherently incapable of achieving Baer's stabilization. So right at the outset, Mekeel is in a different category from Baer—making it less than obvious to solve a problem using Mekeel as a starting point. The clearest indication of what Mekeel taught is in Mekeel's own writing. The first statement in the Mekeel patent (Def. Exh. BB) reads:

“This invention relates to improvements in a digging tooth and more particularly to a reversible dipper tooth . . .”

It should be appreciated that a tooth cannot be reversible unless it is symmetrical. The file history (Def. Exh. BB-1) shows that Mekeel considered his invention to relate to a reversible tooth and during the testimony of the only witness of appellant who testified on this matter, the Court stated:

“I just notice that it makes some observation that it was pointed out this applicant was the first one to conceive and adopt advantages of the digger tooth, specifically reversible tooth.” (R. 500).

6. Judge Sweigert came to the same conclusion at page 115 in speaking of the Baer construction vs. Mekeel:

“[H]e has this relatively heavy spiked section which does not appear in his patent, it doesn't appear in Mekeel . . .”

The witness on behalf of appellant who interpreted this reference was Dirks B. Foster, a patent lawyer. It was well after the Baer invention that Mr. Foster even knew about excavating teeth and even then did not know the difference between a single-piece and a two-piece tooth (R. 533). Foster was taken out to the Kaiser operation at Pleasanton—which was the only time he saw excavating teeth of the type involved. Mr. Foster thus could not be considered the worker of even ordinary skill in the art and thus is incompetent to construe the patent specification. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U.S. 403, 437 (1901):

“The specification of the patent is not addressed to lawyers, or even to the public generally, but to the manufacturers of steel...”

Hensley's own patent was brought to the attention of the Court. This patent stated that the point was reversible, but the picturization gave the distinct impression of being asymmetrical (R. 550). Appellant's witness Foster admitted that patent drawings were not exact picturizations and could not be relied upon to teach exact structure (R. 549).⁷ It is well established that patent drawings are not mechanical drawings. *Gold v. Gold*, 34 App. D.C. 152, 1910 C.D. 314 (C.C.P.A. 1909); *Application of Nash*, 230 F.2d 428 (C.C. P.A. 1956).

3. HOW THE PRIOR ART IS TO BE INTERPRETED

Before continuing the discussion of the elements lacking in Mekeel, it should be appreciated that what appellant is doing here is seeking to find specific counterparts in the prior art (as at pages 46 and 48 of its brief) without regard

7. Thus, there is no error by the Court in:

“10 . . . construing said Mekeel Patent No. 1,845,677 to find the point described therein as symmetrical.”

to the rule laid down in the controlling statute. Hensley pays lip-service to the statute, 35 U.S.C. 103, by quoting the same but ignores its imperative:

"If the differences between the subject matter sought to be patented and the prior art are such that the subject matter *as a whole* would have been obvious . . ." (Emphasis supplied)

This has been the approach followed by this Court, *Radiator Specialty Co. v. Micek*, 327 F.2d 554, 555 (1964):

"We have traced through all of the prior art patents first placed in evidence by the parties and do not find Micek's patent anticipated by any of them. The presumption of validity, to us, remains unimpaired. *Broken up into little parts, there is nothing new about any feature, but it is the combination of many old elements that has created something new* (for the moment at least), beyond the ordinary mechanic's skill." (Emphasis supplied)

This is well established law, the Supreme Court of the United States saying the same thing in 1878 in one of the cases relied upon by Hensley at pages 51 and 55 of its brief. For example, we read in *Bates v. Coe*, 98 U.S. 31, 49 (1878):

"Where the thing patented is an entirety, consisting of a single device or combination of old elements, incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that part of the entire thing is found in one prior patent or printed publication or machine, still another part in another prior exhibit, and still another part in a third one, and from the three or any greater number of such exhibits, draw the conclusion that the patentee is not the original and first inventor of the patented improvement."

However, even before viewing the subject matter as a whole—*i.e.*, what the patentee did to have the elements cooperate (which Hensley cannot afford to do)—there must be the investigation of the prior art to determine what was the level of obviousness to the ordinary skilled worker. This is seen in the factual approach set down at the beginning of this brief and conforms to the procedure recently outlined by the Supreme Court in *Graham v. John Deere Co.*, U.S., 15 L.ed. 2d 545, 556 (1966):

“Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background the obviousness or unobviousness of the subject matter is to be determined.”

Some assistance in making this determination can be obtained from the facts of *Graham* although the Court pointed out, U.S., 15 L.ed. 2d 545, 549, 556 (1966):

“Manifestly, the validity of each of these patents turns on the facts . . . What is obvious is not a question upon which there is likely to be uniformity of thought in every factual context.”

The Graham patent had to do with a plow so that there is some familial relationship to the excavating tooth we have here. Graham's contribution was a vibrating plow, although he had patented one just three years before. The only change Graham made was to reverse the shank and hinge plate of his earlier vibrating plow. The interchange of parts was held obvious—so that the second Graham patent was invalid.

What Baer did was not the reversal of parts—although appellant would mischaracterize the prior art to make it

seem so. Hensley has urged that everything in Baer is found in Mekeel, except the rearwardly-extending tongues. In particular, Hensley would have Mekeel equipped with the Baer spike portion—notwithstanding the exact opposite showing in the patent.

Hensley has recognized this at page 46 of its brief having to rely, among others, on the prior art reference of Hosmer (Def. Exh. S). With Hosmer, who has the spike portion, there is complete capitulation to the thinking that it was too risky to have an easily-removable point. This was discussed by the witness, Bremner, insofar as removability is concerned, as follows:

“[Removed by] brute strength or else with a welding torch. When I say brute strength, that would be the sledge hammer and chisel.” (R. 296)

This type of negative teaching corresponds to that in *United States v. Adams*, U.S., 15 L.ed. 2d 572, 580 (1966):

“We do say, however, that known disadvantages in old devices which would naturally discourage the search for new inventions may be taken into account in determining unobviousness.”⁸

In Baer, as in *Adams*, the individual co-acting elements were known to the prior art: U.S., 15 L.ed. 2d 572, 580 (1966):

“Despite the fact that each of the elements of the Adams’ battery was well known in the prior art, to combine them together as did Adams requires that a person reasonably skilled in the prior art must ignore that (1) batteries which continue to operate on an open circuit and which heated in normal use were not practical; and (2) water-activated batteries were suc-

8. In *Adams*, which was a companion to *Graham*, the Supreme Court found the patent valid.

cessful only when combined with electrolytes detrimental to the use of magnesium. These long-accepted factors, when taken together would, we believe, deter any investigation into such a combination as is used by Adams."

In *Adams*, as in *Baer*, there was an inoperative reference. *United States v. Adams*, U.S., 15 L.ed. 2d 572, 579-580 (1966):

"An inoperable invention or one which fails to achieve its intended result does not negative novelty. *Smith v. Snow*, 294 U.S. 1, 17 (1935)."

Mekeel taught nothing to the excavating art. It was admitted unqualifiedly that nothing ever came of Mekeel and the reason for this was cogently explained by the witness Eyolfson—the basic split-tenon construction precluded the tongues from ever functioning (R. 630).⁹

4. WHAT MEKEEL SHOWS — SPECIFICALLY

The spike portion which results from the asymmetrical construction in *Baer*, is significant in providing a teeter-totter-type action (R. 198, 199) which is impossible in

9. "While the Mekeel Patent was never utilized, and no known manufacture resulted from which its effectiveness could be evaluated, there is serious doubt that a functional operation of Mekeel would provide the desired stabilizing effect. Mr. Eyolfson testified:

'The Court: In other words, you tell me there is no stabilizing effect there.

The Witness: That's right, and what's even more important is that once the thing moves forward in any degree, it could not return because the thing would seize tremendously . . .'" (R. 630).

"The basic teaching of Mekeel is entirely different from that of *Baer*. Mekeel does not rely on tongues for additional stabilization, since a rigid lock is brought about by the expanded tenon which provides the connection between the point and the adapter. This Mekeel contribution is carefully specified in each of the Mekeel claims." (Clk. Tr. 494-5).

Mekeel which lacks the relatively heavy top spike portion. What Mekeel shows is a top and bottom that are the same. (R. 541, 626).¹⁰

The main thrust of Hensley's brief is that Mekeel is pertinent since there are tongues. There is no doubt that the tongues extend the wrong way and this in itself prevented the Mekeel patent from being an effective reference. Even the witness Foster admitted:

"There is probably a difference between the tongues extending rearwardly from the point and extending forwardly from the adapter, but it is a matter of degree and I can't tell how much a degree." (R. 480).

Apart from that, the provision of recesses, *i.e.*, notches in the point, materially weakens the point (R. 288, 289) so that some other means must be provided to insure a proper support. This was in the form of the split-tenon construction in Mekeel, and the very action in doing this would discourage one skilled in the art from utilizing the superfluous tongue and recess construction in Mekeel. Mekeel admittedly does not show what the patent claims. In fact, it goes the other way. This means that a disregard of the essential teaching and a modification is needed. When modification is needed, the reference cannot qualify as an anticipation—as declared by the Supreme Court in *Topliff v. Topliff*, 145 U.S. 156, 161 (1892):

"It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor

10. The lack of this element and anything to provide its equivalent action renders the reference ineffective so there was no error on the part of the Court in:

"11 . . . construing said Mekeel patent No. 1,845,677, so as to find that the point described therein does not provide a heavy upper spike portion."

adapted, nor actually used, for the performance of such function.”¹¹

Thirdly, the spacing between the point and adapter specified by Baer is not objectionable as appellant would have it in its specification of error 12. The claims bring out that the spacing is developed by the dimensions and arrangement of the walls which define the socket of the point. These walls are an integral part of the point and therefore the spacing resulting therefrom is an element properly placed in a claim directed to the point. *Ex parte Crigler*, 125 U.S.P.Q. 448 (Patent Office Board of Appeals, 1959).¹²

In contrast to this, the teaching in Mekeel was that there should be no spacing as can be clearly seen from the Mekeel patent itself (Def. Exh. BB, page 2, lines 69-73) :

“In this case, 14^a indicates the tenon formed on the No. 16^a of the base 12^a. 18^a indicates the shoulder on the nose, which is adapted for engagement with the base of the point 13^a when the points are assembled.”¹³

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11. Therefore, there was no error on the part of the Court in: “9 . . . construing said Mekeel patent No. 1,845,677, and said Baer patent No. 2,483,032, such as to find that the tongues on the adapter of said Mekeel patent are not a true equivalent to the tongues on the point which fit into the recesses of the adapter of said Baer patent.”

12. In *Crigler* the Board found the expression “dimensioned so as to be attached by adhesion to continuous and spaced ear surfaces” to be a structural one and therefore proper in a claim to a unitary element that was used in combination with another. Thus, there is no merit in the contention that the Court erred in: “12 . . . holding that the features of the said Baer patent No. 2,483,032 as expressed in claims 8 and 9 directed to a point only, include ‘spacing between the point and adapter.’”

13. This recitation positively requires contact between the point and adapter so that there was no error on the part of the Court in: “13 . . . finding that the tooth of said Mekeel patent No. 1,845,677, does not include spacing between the point and the adapter.”

As a logical consequence of the foregoing, it is clear that Mekeel not only lacks one element but all three elements specifically found by the Court to be present in the Baer patent—the heavy spike top, the rearwardly-extending tongues, and the spacing developed by the arrangement of the walls defining the socket. Hence, there is no error on the part of the Court in:

“15 . . . construing the prior art patents, including said Mekeel patent No. 1,845,677, such as to find that each has ‘less than the full combination of elements specified in either claims 8 or 9.’ ”

Where the parts are old but co-act to give a new result, patentable invention is present. *Faulkner v. Gibbs*, 338 U.S. 267, 268 (1949). This case is of particular interest because it affirmed the holding of validity and infringement found by the Court of Appeals for the Ninth Circuit, 170 F.2d 34 (1948). The Supreme Court, in reviewing the expert testimony considered by the Court of Appeals for the Ninth Circuit, stated:

“In the instant case, the patent has been sustained because of the fact of combination rather than the novelty of any particular element.

“After the suit in this cause was initiated in the District Court, petitioner modified his device. The courts below held that this modification was insubstantial and did not place petitioner outside the scope of respondent’s patent.”

Appellant is unable to support its 17th specification of error, namely:

“17 . . . the Court erred in basing its holding of validity of claims 8 and 9 in said Baer patent No. 2,483,032, upon a comparison of the entire tooth structure of said Mekeel patent No. 1,845,677, rather than to the

structure of the point alone to which claims 8 and 9 are directed.”

since it was clear that the Court went into each of the elements of the claims and each feature in the Mekeel point specifically. The Court went even further, in considering in detail the mode of operation of Mekeel to see whether the absent elements had any equivalent counterparts. Thus, what Hensley is condemning was a thorough investigation of the prior art so as to meet the requirements of the statute, 35 U.S.C. 103, as recently interpreted by the Supreme Court, *Graham v. John Deere Co.*, U.S., 15 L.ed. 2d 545 (1966), in determining what the content of the prior art was and what was the average skill. Without knowing the meaning of an element—as by its intended mode of operation—these determinations could not be made. For example, Mekeel does not rely on tongues for additional stabilization, since a completely rigid lock is brought about by the expanded tenon. This was Mekeel’s contribution to the art, and it cannot be disregarded in an attempt to find a semblance of anticipation for the purpose of invalidating the Baer patent. *Ex parte Vang*, 72 U.S.P.Q. 185 (Patent Office Board of Appeals 1947); *Ex parte Kniel et al*, 57 U.S.P.Q. 463 (Patent Office Board of Appeals 1943).

Hensley apparently placed his full reliance upon Mekeel (Def. Exh. BB) so as to fit into the classical pattern of cases where the presumption of validity is not conclusive because of a later-found and better reference. However, appellant compromises itself in this approach by the stand taken at page 47 of its brief wherein reliance is placed on a second Mekeel patent (Def. Exh. QQ). If the second patent was so good, why was it not used as the basic reference? On the other hand, if the first patent, the one

relied upon, was so good, why did references have to be made to the second patent—if not to remedy an inadequacy?

Appellant presents a most interesting specification of error in the form of No. 16:

“16. The Court erred basing its holding of validity of claims 8 and 9 of said Baer patent No. 2,483,032, upon a comparison of the prior art with structures manufactured by Plaintiff rather than with the structure defined by said claims 8 and 9.”

As appellee understands this, it is a contention that the Esco commercial construction does not come within the definition of claims 8 and 9. However, Hensley admitted in the pre-trial order (which was drawn up on stipulation), and before Judges Sweigert and Zirpoli in open court that the points it copied from Esco's commercial construction infringed claims 8 and 9. It is difficult to see that if the copies come under the claims, why do not the originals?

This is merely three-step logic:

- (1) The original Hensley points infringed the patent
- (2) The Hensley original points were copies of the Esco commercial points
- (3) Therefore, the Esco points infringed, *i.e.*, come under the patent.

In connection with validity, there remains for consideration only specifications of error Nos. 1, 8 and 18. These are Conclusions of Law challenging in effect the validity of the patent and having no reference to specific findings.

Considering now the Argument portion of appellant's brief, it is seen that insofar as validity is concerned, the major emphasis is on the fact that Mekeel was not considered by the Patent Office. This is stretching for a point

when none is there. The Patent Office did consider Van Buskirk Patent No. 1,925,420 (Def. Exh. Q) which is more pertinent than Mekeel in the fact that it showed rearwardly-extending tongues. Further, Van Buskirk employed the same sliding fit employed by Baer and did not resort to the split-tenon construction of Mekeel which precludes any secondary stabilization by the tongues. The inference under these circumstances is that the Patent Office Examiner considered Mekeel but chose to cite more relevant references. *Elgen Mfg. Corp. v. Grant Wilson, Inc.*, 285 F.2d 476, 479 (7th Cir. 1961):

“The Balfe, Bosley and Cody patents were in the same class and subclass in the Patent Office in which Goldsmith Patent No. 2,825,384 was officially classified. The examiner had ready access to this art. The first search which an examiner makes is in the class and subclass in which the subject matter claimed belong. We must conclude that the examiner reviewed these patents and discarded them.”

In the particular case at hand, the same Examiner, W. C. Bishop, handled both the Mekeel and Baer applications (R. 539).

Acknowledgedly, there was a change, and for that matter, a whole series of changes and a difference in approach between Mekeel and Baer. This brings the case in question squarely within the ruling of the Supreme Court of the United States in *Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed Wire Co.*, 143 U.S. 275, 282 (1892), where the Court said that even though the difference between the prior art and the patent was slight, this difference turned failure to success and was responsible—in the case of barbed wire—for protecting the western plains. The Court summarized the matter as follows:

“Under such circumstances, courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into a success. In the law of patents, *it is the last step that wins.*” (Emphasis supplied)

Further, the courts have said over and over again that the imitation of the thing patented is conclusive evidence of what the defendant thinks of the patent and persuasive of what the rest of the world ought to think. *Filtex Corp. v. Amen Atiyeh*, 216 F.2d 443, 445 (9th Cir. 1954):

“... [W]e have the presumption arising from the imitation of the patented article by the manufacturers of the alleged infringing device. As to this, we agree that what was said by Judge Hough, speaking for the Court of Appeals for the Second Circuit in *Kurtz v. Belle Hat Lining Co.*, 280 Fed. 271, 281: ‘The imitation of a thing patented by a defendant, who denies invention, has often been regarded, perhaps especially in this Circuit, as conclusive evidence of what the defendant thinks of the patent and persuasive of what the rest of the world ought to think.’”

B. Infringement

1. IMPLIED ADMISSION OF INFRINGEMENT

All of Hensley’s argument on non-infringement should be read with the following admissions in mind:

- (1) The initial 109 points were admitted infringements; and
- (2) There was no change in going from the first to the second versions except as to taking $\frac{1}{8}$ " of metal off the tongues.

Tongues are provided as part of the casting, which is not a precision element. Hensley himself even admitted to a difficulty in measuring closer than 10° (R. 353). The

tongues are relatively short so measurements can be twisted to suit any purpose. The correct approach therefore is to see what the tongues do—especially in view of the fact that Hensley had no reason for putting them there. (Pl. Exh. 14, page 47). The shape of the tongues was not critical, just a matter of “intuition” (Pl. Exh. 17, page 23):

“Q. What dictated the shape that you changed to, that seen in Exhibit 3 [Trial Exhibit 5]?

A. A notice from Electric Steel Foundry that—

Q. Maybe I am wrong. We have been through all that. What I meant was, how did you select that particular shape, the shape that is seen on Exhibit 3 [Trial Exhibit 5], as contrasted to, say having, none at all?

A. Well, it was my own intuition on how to do it, that’s all.”

Hensley admitted to the fact that the tongues gave lateral support (R. 182). The diminution in tongues was only for the purpose of attempting to avoid infringement without any change in function (Pl. Exh. 14, pages 42-44):

“Q. Do you have any reports on the function of the rearwardly-extending tongues of the type seen in plaintiff’s Deposition Exhibit 2 [Trial Exhibit 4]?

A. Reports from where?

Q. I asked you the question whether you have any reports.

A. This is entirely outside of my own knowledge.

Q. Do you have any reports that you know of?

A. No, I don’t know of any reports.

Q. Then why did you ask the question ‘from where’?

A. Well, whether it was from the field or from the laboratory, or from—

Q. Well, do you have any from the field?

A. No, I have no reports from the field on the point in question.

Q. How about from the laboratory?

A. Yes, I have reports from the laboratory on the points in question.

Q. Are those written reports?

A. They are.

Q. They are in your files?

A. They are.

Q. Any other reports on the function of the rearwardly-extending tongues or ears of the type seen in Plaintiff's Deposition Exhibit 2?

* * *

A. No, no reports on that.

Q. Well, then, going back to where you were talking about these lab reports, were you talking about the square-shaped tongues or the triangular-shaped tongues?

A. The lab reports we were talking were of the metallurgy.

Q. Well, what is the function of those ears on Plaintiff's Deposition Exhibit 3 [Trial Exhibit 5]?

A. They are shark fins, splitter bars that brush the aggregate away from the web of the point, of the box section.

Q. But why do they extend beyond the rear face of the point?

A. That's just the way we happen to make them."

Hensley admitted that a dynamic test was the correct approach (R. 449). So the question is whether shaving off $\frac{1}{8}$ " from the tongues of the admittedly infringing points makes them non-infringing. Added to this is the fact that the tongues become encrusted—that hard, earth layers build up when the points are in operation (R. 611). This led Judge Zirpoli to find that the change was only a "colorable" one—in accordance with the established law: *Admiral Corp. v. Zenith Radio Corp.*, 296 F.2d 708, 717 (10th Cir. 1961), where the patent was held valid and infringed:

"One point remains to be considered. Admiral urges that the 1960 model remote control transmitter used in the Son-R does not infringe on patent No. 956 relat-

ing to the mounting of the resonator. Non-infringement is claimed on the ground that the 1960 mounting used a circumferential groove rather than diametrically opposed flatbottomed grooves with a resultant two-point suspension rather than the four-point as employed in the preferred 956 design. The trial court held that this was an imperfect utilization of the 956 patent with the hopes of evading infringement while enjoying the major benefits of the teaching of 956. A device may infringe a patent even when it does not utilize fully the best mode of practicing the invention. We have said that impairment of function and lessening of results in degree only does not avoid infringement."

The infringer in the *Admiral* case attempted to avoid the patent by using a less stable mounting—a two-point suspension rather than a four-point suspension. Here Hensley is attempting to avoid infringement by foregoing certain initial stages of stabilization in the smaller-size points where stabilization may not be needed as often.

Hensley makes much out of the fact that the Court did not specifically *differentiate* between the four-inch, five-inch, six-inch and seven-inch points insofar as the character of the tongues is concerned.¹⁴

This is interesting since it carries the implied admission that some of the points infringe. Hensley raises no question as to the six-inch point (see Appellant's brief, page 54) and does not seriously question the fact of infringement by the seven-inch size (see Appellant's brief, page 52). Really, the only complaint is that Esco did not run its guillotine

14. "3. The Court erred in holding claims 8 and 9 of said Baer patent No. 2,483,032, generally infringed by Defendant's points without *differentiation* as to the various models of points."

"5. The Court erred in holding that the tongues on the Defendant's points in general serve a stabilization purpose without *differentiation* as to the various models of points."

tests on all of the points. This disregards the fact that tests are nothing without testimony—live testimony being the best evidence. The testimony clearly supports the finding that all sizes infringed, particularly the four-inch and five-inch sizes. First, the witness Wilcox based his testimony of infringement on the four-inch size (Plaintiff's Exhibit 5, R. 208-211). Also, Clyde C. Hensley admitted "dinging" (i.e., scarring contact) of the tongues during his tests (R. 329). Eyolfson found "pinging" of the tongues on the four-inch size (R. 624). On the five-inch size, the witness Graf found contact of the tongues with the adapter recesses (R. 588-89). When Judge Zirpoli saw the seven-inch size, he said:

"If you are going to rely exclusively on what I see, my conclusion at the moment would have to be that they appear to be substantially parallel."

The fact of the matter is that whittling away $\frac{1}{8}$ " from the smaller size makes the resultant tongue *look smaller*—but this cannot do away with the fact that there is still a tongue present to function when needed in a heavy-stress condition. Hensley has admitted infringement on the first version and only changed the tongues by making a $\frac{1}{8}$ " clearance relative to the recesses. The basic elements were all there so that there is no merit in Specification of Error No. 4.¹⁵

The small change in structure with no change in function rules out Specification of Error No. 2. *George W. Ashlock Co. v. Atlas Pacific Engr. Co.*, 225 F. Supp. 205 (N.D. Cal., 1963).¹⁶

15. "4. The Court erred in construing claims 8 and 9 of said Baer patent No. 2,483,032, such as to find the basic features thereof in Defendant's points."

16. "The Court erred in holding that 'the defendant's change in design and construction of its new points is insufficient to avoid its previously admitted infringement of these two claims' and was 'at most a colorable change.'"

2. TECHNICAL AVOIDANCE OF THE CLAIM

Hensley has asked this Court to construe the claims narrowly—in accordance with certain statements read from the patent. More particularly, Hensley wants this Court to vary the express language of the claims to call for a “snug” fit between the tongues and recesses and secondly, that the tongue sides are “parallel”, notwithstanding the fact that the claims read “substantially parallel . . . to fit . . .”. Hensley would have the Court disregard the clear statement set down by the Supreme Court in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605, 607 (1949):

“If the accused matter falls clearly within the claim, infringement is made out, and that is the end of it.”

In the same case and at the same time, the Supreme Court spoke out forthrightly against the type of technical approach used by the Appellant here, saying:

“The courts have also recognized that to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing. Such a limitation would leave room for—indeed encourage—the unscrupulous copyist to make unimportant and insubstantial changes and substitutions in the patent which, though adding nothing, would be enough to take the copied matter outside the claim, and hence outside the reach of law. One who seeks to pirate an invention, like one who seeks to pirate a copyrighted book or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthright duplication is a dull and very rare type of infringement. To prohibit no other would place the inventor at the mercy of verbalism and would be subordinating substance to form. It would deprive him of the benefit of his invention and would foster concealment rather

than disclosure of inventions, which is one of the primary purposes of the patent system."

The courts have repeatedly held that where the patent represents a distinct step forward, liberal interpretation of the patent is indicated, *i.e.*, there is to be no mechanistic interpretation of "substantially parallel . . . to fit . . .".

Chief Justice Taft stated in *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U.S. 45, 63 (1923):

"In administering the patent law, the court first looks into the art to find what the real merit of the alleged discovery is and whether it has advanced the art substantially. If it has done so, the court is liberal in its construction of the patent, to secure to the inventor the reward he deserves."¹⁷

Hensley is still trotting out its tired argument on file wrapper estoppel. This was specifically rejected first by Judge Sweigert and then by Judge Zirpoli. The fact of the matter is that there is no file wrapper estoppel since the claims from the outset specified that the tongues had substantially parallel side edges. All that was added during the course of prosecution of the patent was to make clear the fact that these tongues cooperated differently with the remaining elements of the tooth from those seen in the prior art.

17. Thus the Court did not err:

"6 . . . in giving a broad interpretation of the term 'substantially parallel' as such term is used in claims 8 and 9 of said Baer patent No. 2,483,032, in order to find infringement thereof."

"7 . . . in failing to hold claims 8 and 9 of said Baer patent No. 2,483,032, are limited by statements made in the file wrapper of that patent and, as so limited, are not infringed."

3. COMMENTARY ON APPELLANT'S ARGUMENT ON INFRINGEMENT

Appellant places great reliance on the previous opinion of this Court in *D & H Electric Co. v. M. Stephens Mfg. Inc.*, 233, F.2d 879, 883-884 (1956). Hensley's brief contains references to this case and quotations therefrom on pages 58-60. The reliance is misplaced. In fact, the quotation given by appellant sets forth the distinction most clearly, *i.e.*:

"Slight as this difference may be, it invokes an entirely different principle of operation." (233 F.2d 879 at 884)

Here, the Court was talking about the fact that the claims called for certain ribs to be at substantially 90° while the accused device had projections varying from 85° to 89°. The difference was that in having any departure from a right angle, the device operated as if it had screw threads. This is what the patentee had to forego in order to achieve a patent.

This is not the case with Baer. In Baer, the rearwardly-extending tongues from the outset were specified to have substantially parallel side edges. What the applicant did during the course of the prosecution of the application to achieve the patent was to specify what these tongues did. Hensley's tongues perform exactly the same function. There is not the entirely different principle of operation regarded as meaningful by this Court in the *D & H Electric* case. The identity of function of the Hensley tongues and those of the patent can be further appreciated from the contrivance resorted to by Hensley in order to justify its copying. Hensley started off with Chinese copies of the Esco rearwardly-extending tongues and in addition had some little wedges on the sides of the point (see particularly Plaintiff's Exhibit 12 reproduced at page 1 of the Appendix hereto). After being cautioned about infringement, the

tongues were tapered slightly and the "shark fin" extended rearwardly (see Plaintiff's Exhibit 13 at page 1 of the Appendix hereto). This was just a matter of taking metal from the top and bottom of the tongues and putting it on the side.

A case squarely in point is *Chicago Pneumatic Tool Co. v. Hughes Tool Co.*, 97 F.2d 945, 947 (10th Cir. 1938):

"The patent calls for long, narrow, chisel-shaped penetrating teeth, . . . The argument is that the teeth in the accused device are pyramidal, and that the sides of the rows are not parallel . . . and while the adjacent sides of the rows are not precisely parallel they are approximately and substantially so. The departures from the claims in respect to the change in form of the teeth are colorable and without change in principle. As such they do not avoid infringement."

The citation of *U. S. Slicing Machine Co. v. Wolf Sayer & Heller Inc.*, 243 Fed. 412 (N.D. Illinois 1917) is an attempt to create a proposition of law for which there is no support. Here appellant is talking (page 63 of the Brief) about the fact that the Hensley points had tongue engagement at 16,000 foot-pounds whereas the normal check test was 6,000 foot-pounds. First off, Hensley has misconstrued the test since the 6,000 foot-pounds is a proof test—a test not even approaching destruction or strong stress. This is a "minimal requirements" test. On the other hand, the tongues are provided to prevent premature failure under extraordinary stress conditions. It is even possible that a given tooth point may be used throughout its wear life without ever encountering such an extraordinary stress. This would be the possibility if the tooth point were used for digging sand. However, in anything but the softest environment, there is the possibility of "hooking" the tooth

point under a rock or ledge and with the power involved, there is the possibility of even tipping the machine because of the tremendous stresses involved (R. 200). This is an instantaneous affair and it is protection against such an untoward happening that is provided by the tongues.¹⁸

18. All of this was graphically and orally demonstrated to the Court by films, testimony and exhibits. As such, the findings of the Court are bolstered even further than that provided by Rule 52 of the Federal Rules of Civil Procedure:

“To no type of case is this last clause more appropriately applicable than to the one before us, where the evidence is largely testimony of experts as to which the trial court may be enlightened by scientific demonstrations.” *Graver Tank & Mfg. Co., Inc. v. Linde Air Products*, 336 U.S. 271, 274 (1948).

Further, it is to be noted that the findings were embodied in an opinion. Some courts would regard this as an exceptional situation under Rule 52. For example, Chief Judge Major, speaking for the Court of Appeals for the Seventh Circuit said in *Consolidated Water Power and Paper Co. v. Kimberly-Clark Corp.*, 204 F.2d 573-74 (1953):

“With the knowledge thus acquired during a lengthy trial and from his personal observation of the processes in controversy, he did not at the conclusion merely indicate which party was to prevail, with a request for the submission of findings of fact and conclusions of law, as is oftentimes done by trial judges, particularly in patent suits. Instead, he prepared a lengthy opinion, embodying his findings and conclusions.”

Not only does the handling of this trial indicate that the findings of infringement were correct, but also those on validity. *Neff Instrument Corp. v. Cohu Electronics Inc.*, 298 F.2d 82, 87 (9th Cir. 1961):

“The presumption of a patent’s validity which arises from its issuance by the Patent Office, is strengthened by the finding of validity by the district court.”

THE CONCLUSION

The haunting question persists: IF THE REARWARDLY-EXTENDING TONGUES DO NOTHING, WHY DID HENSLEY KEEP THEM?

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing Brief is in full compliance with those rules.

DAVID VAN HOESEN

Attorney for Appellee

(Appendix Follows)





Appendix

No. 39806 ~~39806~~

P. P. T. Exhibit No. 12

Filed OCT 6 - 1964

James P. Welsh, Clerk

By J. P. Welsh
Deputy



ESCO TYPE

No. 39806 ~~39806~~

P. P. T. Exhibit No. 13

Filed OCT 6 - 1964

James P. Welsh, Clerk

By J. P. Welsh
Deputy



ESCO TYPE

[474]

Filed—Sep-8 1965

Clerk, U. S. Dist. Court San Francisco

*In the United States District Court for the Northern
District of California, Southern Division*

No. 39806

Esco Corporation,

Plaintiff,

vs.

Hensley Equipment Company, Inc.,

Defendant.

MEMORANDUM OPINION AND ORDER

Esco Corporation, the plaintiff, is an Oregon corporation, located at Portland, Oregon. It also maintains a plant at Danville, Illinois. Esco's business includes, among other things, the manufacture and sale of expendable products for construction equipment, such as excavating teeth and replacement points for those teeth.

Hensley Equipment Company, Inc., the defendant, is a California corporation, located at San Leandro, California. Defendant is also engaged, among other things, in the manufacture and sale of excavating teeth and replacement points for those teeth. Defendant sells its products through various dealers in the United States, and among those dealers is one W. M. Hales Company, Inc., of Danville, Illinois, which latter company, in addition to being a dealer, is also an independent warehouse operator and operates a warehouse at Danville not only for the benefit [475] of defendant, but also for other manufacturers.

This suit was brought on United States Letters of Patent 2,483,032, hereinafter called the "Baer Patent", and under the Patent Laws of the United States (35 U.S.C. 271, 281; 28 U.S.C. 1338(a), 1400).

The subject matter of the Baer Patent is an excavating tooth. Excavating teeth are metal devices which fit on the front or digging edges of dippers, shovel buckets and the like and serve to aid in the penetration and breaking up of earth or rock in which such equipment is working. The particular type of teeth concerned in this suit are two-part excavating teeth, including an "adapter" portion and a wedge-shaped wear "point". The point is a separate, relatively small tip that fits on the adapter and provides the actual cutting edge of the overall tooth. The commercial value of such excavating teeth lies in the fact that the point can be easily fitted on to the adapter, maintained securely thereon during the heavy stresses encountered in field operations and yet readily releasable for replacement when worn down or when it otherwise becomes time to replace the point. The resultant savings in man hours and metal have been a boon to the heavy construction industry.

While excavating teeth of a two-part nature were known to the art as early as 1909 (Patent No. 915,809 issued to B. C. Thomas) and had had some limited commercial use in the late Thirties and early Forties, extensive commercial use of such two-part excavating teeth did not commence until about 1945 or shortly thereafter.

The patent in suit, the Baer Patent, of which only claims 5, 8 and 9 are at issue for decision by this Court, was granted on September 29, 1949 to Joseph Baer on an application filed in the United States Patent Office on June 6, [476] 1945. Prior to issuance, the application and all rights therein were assigned to Electric Steel Foundry Corpora-

tion, which by change of name became Esco Corporation, plaintiff in this suit. Plaintiff is now, and at all times during the commission of the acts complained of by plaintiff has been, the owner of the entire right, title and interest in and to the Baer Patent, including the right to sue for patent infringement.

In the year 1947 defendant started making its own two-part excavating teeth and in the year 1948 it started making replacement points for the teeth of other manufacturers of two-part teeth. These included the Caterpillar type, for which it paid a royalty, H & L type, the patent on which had expired, and Ateco type and Saber type, which latter two were not patented. About 1960 defendant entered into the manufacture of the Esco (Baer) type replacement points. For this purpose defendant purchased five Esco two-part teeth (points and adapters) in order that it might "capture the dimensions" that are necessary to fit its manufactured Esco type points to the Esco adapters. Defendant, at the time of the purchase of these Esco points and adapters, knew that these pieces carried patent numbers on them. After the defendant had manufactured 109 Hensley-Esco type wear points, Clyde Hensley, the President of defendant corporation, received a visit from Hal Robb of the plaintiff corporation, who said to him, "Oh, you have ears that fit snugly into the recesses of our adapters. You are infringing our patent." (R. 181) Defendant immediately stopped production and made certain changes in the pattern of its Hensley-Esco type points in order to keep the ears (more often described as tongues) of the wear points from fitting snugly into the recesses of the Esco adapter by changing the formation of [477] the tongues in such manner as to provide "an eighth of an inch clearance and a hardened piece of steel." (R. 181). As the witness Clyde

Hensley said, "I didn't want to infringe the patent, so I immediately changed so that it didn't interlock." (R. 182). He further testified that he "just changed the shape of the tongues" and made no testing other than to try the new wear points on the adapters to see that there was an eighth of an inch clearance.

It is admitted by the defendant that *if the Baer Patent is valid*, the first 109 points manufactured by defendant infringe claims 8 and 9 of that patent. This admission of infringement of claims 8 and 9 appears from the record in several places. In the pretrial order, approved as to form and content by the defendant, it is provided as follows: "6. The admitted and undisputed facts in the case include: . . . (i) That the defendant has manufactured a small number of points as defined in Claims 8 and 9 of the patent in suit, and that these points infringe said claims if the claims are valid." At the hearing on motion of summary judgment, counsel for defendant admitted that this small number of points infringe the Baer Patent when he said, "We admit that they (referring to these 109 points) would infringe and we also admit that the defendant would be liable for such infringement if the Baer patent were valid.", and during the course of the trial counsel again admitted that these points infringed. In answer to the Court's question, "You have admitted that the first teeth would infringe if a patent exists", counsel for defendant replied, "Yes, Your Honor, we did." (R. 23).

As to the defendant's subsequently manufactured wear points, plaintiff complains (1) that the manufacture and sale of such wear points *directly infringe claims 8 and 9 of [478] the Baer Patent* and (2) that because of defendant's relationship with W. M. Hales Company, Inc. of Danville, Illinois, the *defendant infringed claim 5 of the*

Baer Patent *by inducement* in that defendant induced W. M. Hales to purchase new adapters from plaintiff and new replacement points from defendant for the purpose of assembling the two together for sale by W. M. Hales as a complete unit.

Before turning to claims 8 and 9, which relate generally to the wear point itself and which form the heart of this case, the Court finds that the plaintiff's allegation that defendant infringed claim 5 (which relates to the overall combination of the wear point and the adapter of the Baer Patent) *by inducement* is without substance. The induced party is supposedly W. H. Hales Company of Danville, Illinois; however, there is not the slightest bit of evidence from which one could reasonably conclude that any inducement occurred. Plaintiff appears to be attempting to show an agency relationship between defendant and W. H. Hales Company, but the evidence will not sustain plaintiff's contention:

“Mr. Herbert: Q. Mr. Hensley, do you know Mr. Herbert Hales?

“A. Yes, I do.

“Q. What is your relationship with him?

“A. He is one of my warehouse outlets in Danville, Illinois, and also a dealer for Hensley Products within his trading area.

“Q. Would you explain your relationship, or rather, what your business arrangement is with Mr. Hales with respect to warehousing and with respect to his dealership?

[479] “A. Well, we have an arrangement with W. M. Hales Company whereby we pay him a fee for stocking our merchandise and reshipping to other dealers on the eastern seaboard, for which we pay him a warehousing fee and three per cent handling charge for products reshipped for us. Then the other phase of his business as far as we are concerned, he draws

from our warehouse and sells direct to the contractors in his trading area, immediately around Danville, Illinois.

"Q. Do other of your dealers draw from that warehouse?

"A. They do.

"Q. You mentioned W. M. Hales Company. How is this related to—

"A. W. M. Hales Company—

"The Court: Well, let's start first with, has this always been the relationship?

"The Witness: Yes, it has been, since the—

"The Court: It hasn't varied at any time?

"The Witness: No, sir.

"The Court: All right.

"The Witness: Well, yes, sir, I might qualify that, because over the years, prior to him becoming a warehousing agent, from time to time he bought other products or products in the Hensley line, on an occasional basis, but not on a regular basis.

"The Court: All right.

"Mr. Herbert: Q. And what did you say was W. M. Hales Company?

[480] "A. W. M. Hales is the company of which Herb Hales is the General Manager and President—I assume, although I am not sure he is President.

"Q. But Herbert Hales is connected with W. M. Hales?

"A. He is considered the owner of W. M. Hales Company, yes.

"Q. Have you instructed W. M. Hales Company or Herbert Hales or any one with that company how to sell your points?

"A. No, sir, I have not.

"Q. Have you ever instructed or suggested that your points be sold on new Esco adapters?

"A. No, sir, I have not.

"The Court: Did you ever become aware of that fact?

"The Witness: I never became aware of that fact, no, sir.

"The Court: Until when?

"The Witness: Until recently when it was testified here by someone.

"The Court: Well, were you aware of it at the time the complaint was filed?

"The Witness: Just generally. But specifically, I didn't—I wasn't aware of the circumstances, no.

"Mr. Herbert: Your Honor, I think at this time I might indicate that the time the complaint was originally filed, induced infringement was not charged. It was charged after the depositions in Danville.

"The Court: All right.

[481] "Mr. Fallon: I think the record ought to be consulted before that statement is made.

"The Court: Well, I can consult the record. I have it here.

"Mr. Herbert: Q. Do you have any control over Mr. Hales' or W. M. Hales' action in their business as dealers or distributors?

"A. No, sir." (R. 356-359)

Applying the test suggested by plaintiff in its trial brief:

"But civil culpability need not stop with the dealer who does the final act of making, using or selling. The prohibition of the law, now codified in 271 (b), extends to those who induce that infringement. Of course inducement has connotations of active steps knowingly taken—knowingly at least in the sense of purposeful, intentional, as distinguished from accidental or inadvertent. But with that qualifying approach, the term is as broad as the range of actions by which one in fact causes, or urges, or encourages, or aids another to infringe a patent." *Fromberg, Inc. v. Thornhill*, 315 F. 2d 407, 411 (CA 5, 1963).

the Court finds no active steps knowingly taken by defendant for the purpose of causing, urging, encouraging or aiding another to infringe the Baer Patent. The fact that defendant is listed in the telephone directory as having, and the fact that it does have, a telephone in the Danville office of Hales and the fact that defendant puts out a price list showing that Hensley Equipment Company is located at Danville and ships out of Danville, in and of themselves do not and could not create an agency relationship. Defendant's relationship with W. H. Hales is that the Hales Company maintains an independent warehouse for defendant, for which he charges accepted warehousing fees. Defendant has never discussed with Hales how to sell Hensley points on new Esco adapters. In fact, the evidence discloses that Mr. Hensley, [482] the defendant's President, never even knew that Hales was selling Esco adapters and Hensley points as a unit until someone had testified to it during the course of the proceedings and after the filing of the complaint in the present action. Moreover, defendant does not now have and has never had any control over Hales in their business as dealers or distributors. Under the foregoing circumstances there could be no inducement and hence no infringement of Claim 5 by defendant. There is, therefore, no further need to consider Claim 5 of the Baer Patent and this Court does not now pass upon the validity of this claim. The Court merely finds that the defendant has not infringed Claim 5 of the Baer Patent.

Turning to Claims 8 and 9 of the Baer Patent, in reply to plaintiff's complaint that these claims have been infringed, defendant, in addition to denying any infringement, alleges that the Baer Patent is invalid and void on the grounds (1) that the subject matter of the Baer Patent was old when Baer made his design, and in fact, was well

known more than one year before Baer filed his patent application, and (2) that the Baer disclosure contained no more than a minor modification over other well known structure, which modification would have been obvious at the time invention was made to a person having ordinary skill in the art.

Defendant further alleges that plaintiff comes into Court with unclean hands, in that it has affixed, or caused to be affixed, to certain structures the number of the patent in suit, thereby falsely implying that those structures are patented.

The defendant, as appears above, has admitted that the first 109 points it manufactured infringe Claims 8 and 9 of [483] the Baer Patent. The Court, after considering the exhibits, laboratory tests, testimony and all other evidence in the case, is satisfied that, if claims 8 and 9 of the Baer Patent are valid, the defendant's change in design and construction of its new points is insufficient to avoid its previously admitted infringement of these two claims. The first manufacture by defendant of Hensley-Esco type points is exemplified in Exhibit 12 and the subsequently changed manufacture by defendant of Hensley-Esco type points is exemplified in Exhibit 13. When questioned about the differences in the manufacture of these two items, Mr. Hensley testified as follows:

"The Court: And you are familiar with the differences in the manufacture of 12 and the manufacture of 13?

"The Witness: I am, Your Honor.

"The Court: Would you tell us what those differences are?

"The Witness: In Exhibit 12 the ears were somewhat square in shape and in Exhibit 13 they were more of an extended sharkfin without parallel sides.

"The Court: Other than the ears, is there any difference in those two manufactures?"

"The Witness: No, sir, not any difference whatsoever." (R. 174)

This difference in the ears (or tongues) consisted of a change in the shape of the tongue (ear) so as to yield a one-eighth of an inch spacing in the recesses of the adapter and an extension of the fins (designated "sharkfin" [484] by the defendant) so as to make them coextensive with the changed tongues. In this fashion the horizontal dimension of the tongue was increased, while the vertical dimension was decreased. No tests or calculations were utilized, the change being merely Clyde C. Hensley's "intuition". While the sides of tongues on the smaller sized Hensley-Esco type points may or may not be said to be substantially parallel, the sides of the tongues on the larger, 7", sized Hensley-Esco type points appear to be as close to substantially parallel as measurement could provide (R. 666, 667). Furthermore, Clyde C. Hensley did not deem angle of the sides of the tongue of any significance to him (R. 354). The above described change is at most a colorable change, and as such it cannot avoid infringement. While the "sharkfin" structure on the outside of the tongue sides of the Hensley-Esco point may have some value for the purpose of throwing or sweeping away aggregate in a digging operation, the subsequent change in the Hensley-Esco tongue with an extension of the shark fin so as to make it coextensive with the tongue merely resulted in a change in appearance (R. 174), and in no way aided the operation of the shark fin, which leads to the question, if, as Clyde C. Hensley testified on deposition (his deposition of October 4, 1961, p. 49), there was no reason for having the rearwardly extending tongues, why did he keep them when he made the change?

The question is particularly important in the light of his statement that he "didn't want to infringe". The reasonable answer brought out in the laboratory tests of plaintiff's engineers, both eminently qualified, seems to be the stabilizing function of the rearwardly extending tongues. Both plaintiff and defendant offered laboratory tests to show [485] the stabilizing effect of the tongues on the Baer and the Hensley-Enesco type points. Of the two tests, the Court finds the plaintiff's guillotine test (a dynamic test) to be by far the more reliable and as close to normal severe operations as a test could come. The Hensley tests, which were designed by an employee who has a PH.D. degree in Electricity and Metallurgy (R. 376), but who was not present at the trial, were run by Clyde C. Hensley, whose competence as an engineer does not approach that of Eyolfson and Graf, who ran plaintiff's tests. Furthermore, the Hensley tests, which were in the main made on smaller sized points (where the additional stabilization effect has lesser importance), were variable and impossible to evaluate. The Hensley tests failed to place the load (stress) on the tip of the tongue where it should properly have been placed, in order to emulate stress applications found in field operations, while in plaintiff's tests the load was placed on the tip of the point and generally transversely thereto, thereby simulating heaviest field loading. In fact, in the Hensley tests the load was moved further and further away from the tip of the point as the size of the point increased, and no effort was made to test the larger 7" point. The plaintiff's tests showed that both Baer and Hensley-Enesco type points operate in the same manner, i.e., the inwardly extending tongues provide a stabilizing function in addition to the wedge faces and thereby protect the pin from deformation and make the point removal simple. Clyde H. Hensley ad-

mitted that although the one-eighth of an inch spacing in the recesses of the adapter remains unchanged, the tongues become larger as the Hensley-Esco type points become larger (R. 178), and that stabilization becomes more important as [486] size increases (R. 371). This may well account for defendant's attempt to avoid infringement by foregoing certain initial stages of stabilization in its smaller size points where added stabilization may not be needed as often. A somewhat less efficient operation does not avoid infringement. See *Admiral Corp. v. Zenith Radio Corp.*, 296 F.2d 708, 717.

As an appendix hereto the Court has attached copies of plaintiff's Exhibits 23A and 24A, drawings showing the basic features of Claims 8 and 9 of the Baer Patent *as they are found in the Hensley-Esco type points*.

The Court is satisfied that the tongues on the Hensley-Esco type point serve the above indicated stabilization purpose and that this is the very reason they were retained. It follows from the foregoing that, if valid, Claims 8 and 9 of the Baer Patent have been infringed by the manufacture and sale of Hensley-Esco type points and the Court so finds. See *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605, 617.

This now brings us to the basic issue before the Court: Are Claims 8 and 9 of the Baer Patent valid?

Of the fifteen patents on two-piece teeth brought to the attention of the Court by the defendant, only one came into commercial use prior to World War II, and this required time consuming burning or battering to remove the replaceable point (R. 296). The inventor of the excavating tooth of the patent in suit, Joseph Baer, was working on the problem of easily removable points on two-part teeth early in World War II and originated a construction wherein the

locking means was not stressed during field operations (R. 197, 201). [487] The Baer construction employed a wedge-shaped point fitting over the adapter nose, with a pin passing vertically through aligned openings in the point and nose. The pin was held in place by a rubber plug equipped with a steel insert. For drawings of the Baer Patent, see copies thereof, plaintiff's exhibit 2, included in the appendix hereto.

According to the patent, the nose of the adapter is wedge-shaped, having converging faces. The point has a rearwardly facing socket defined by similar wedge faces, so that the point can seat on the adapter nose. The upper portion of the point is relatively thick or heavy to constitute a spiked portion. Rearwardly of the point are provided integral tongues which fit into recesses provided on the adapter. The mating portions of the point and adapter are so arranged that the point can move rearwardly on the adapter as wear occurs on the seating bearing faces of the nose and socket. For this purpose spacing between the socket apex and nose is provided, as also is spacing between the rear ends of the recesses and the rearwardly extending tongues.

When the adapter has its rear or shank portion secured to the lip of a piece of excavating equipment, the tongues serve to stabilize the point against transverse stresses. This provides stabilization in addition to that provided by the wedge faces. In so doing, the tongues serve to protect the locking pin against deformation. Even under heavy stresses, the pin is merely used to oppose gravity to keep the point from falling off the adapter (R. 56, 102). Thus, there is no deforming stress applied to the pin which would make it difficult to remove when point replacement is necessary (R. 102).

[488] The spike portion of the point is normally stressed at its tip, and the type of stress that would tend to deform the pin is a transverse stress, i.e., one at right angles to the length of the spike portion. These transverse forces can reach upwards of 10,000-20,000 foot pounds (R. 54). When transverse forces of this order are applied to the tip of the spike portion, the spike portion acts as a cantilever to transfer the stress to the rear of the point, using the adapter nose as a fulcrum (R. 155, 199). The operation under destructive stresses applied transversely to the spike portion, the point, while deflecting, moves forwardly slightly, so that the tongues come into bearing engagement with the walls of the adapter recesses. The tongues fit within the adapter recesses with substantially parallel side edges, with a sliding fit in order to accommodate wear on the edge bearing surfaces (R. 213). Deflections of the order of one and one-half inches are not uncommon at the spike portion tip, which are transmitted in lever fashion by means of the heavy spike portion to the tongues so as to prevent deformation of the locking pins (R. 199).

These Baer-type excavating teeth enjoyed an immediate and widespread commercial success (R. 300). Licenses under the patent were taken out by such principal tooth manufacturers as American Steel Foundries, now Amsted Industries, the American Manganese Steel Company Division of American Brake Shoe Company, and Caterpillar Tractor Company (R. 215).

In its effort to overcome the presumption of validity that attaches to the Baer Patent and in support of its burden of proving invalidity, the defendant introduced in evidence fifteen patents on two-part teeth, but relied primarily upon the Mekeel Patent, copies of the drawings [489] of which (defendant's Exhibit BB) are included in the appendix

hereto. However, it would appear that teeth based upon the Mekeel Patent, the defendant's most pertinent overall reference against the Baer Patent, were never actually constructed and thus never put to any commercial use or test.

The basic difference in plaintiff's and defendant's treatment of Claims 8 and 9 lies in plaintiff's reliance on the principle that where the parts are old but coact to give a new result, patentable invention is present, *Faulkner v. Gibbs*, 338 U.S. 267, 268, while defendant contends that the various parts of the point function independently and there is no coercion, and hence, no patentable invention. *A & P Tea Co. v. Supermarket Corp.*, 340 U.S. 147. Furthermore, says the defendant, the teachings of the Baer Patent and the Mekeel Patent are identical, the entire structure of Baer being described in the earlier Mekeel Patent.

During argument on Motion for Summary Judgment, plaintiff urged three features as being the major distinctions between Baer and Mekeel structures as they relate to Claims 8 and 9, namely, (1) the reversal of the tongues and recesses (by putting the tongues on the point and the recesses in the adapter); (2) the heavier upper spike portion of the Baer point; and (3) spacing between the parts of the point and the adapter. The colloquy between the Court and counsel was as follows:

"The Court: You mean then, that you solved the problem of long standing by reversing the tongues?"

"Mr. Fallon: First.

"The Court: Beefing up the point?"

"Mr. Fallon: Second, yes, sir.

[490] "The Court: By putting on a heavier spike top?"

"Mr. Fallon: Yes, sir.

"The Court: And by providing a non-closure between the two of them?"

"Mr. Fallon: Yes, Your Honor, three things."

In addition to the above, plaintiff urges as significant the fact that the Mekeel point was symmetrical (reversible) and that therefore the upper and lower edges of the tongues and recess could not both be parallel to each other and also to the upper wedge face of the adapter nose, and that there could be no stabilizing effect in the functional operation of the Mekeel tooth.

With relation to the three major and distinctive features relied upon by plaintiff in support of Claims 8 and 9, defendant contends that each feature is old and may be found in the prior art, as exemplified in various patents introduced in evidence through its witness, Dirks Foster. That each of these features, if considered separately, may be said to have been anticipated by the prior art, exemplified by patents offered in evidence seems clear, but the big and narrower question is, do these features operate independently of each other or are they so coactive as to bring a new and useful result. In answering this question, while it is true that Mr. Foster, a patent attorney, testified that these three features operate independently of each other, the fact remains that such testimony is argumentative in character and must be viewed with caution. *Kohn v. Eimer*, 265 F. 900, 902; *Rogers v. Hensley*, 194 Cal. App. 2d 486, 492. See also *Rick-Wil Co. v. E. B. Kaiser Co.*, 179 F. 2d 401, 405, and *Hughes Tool Co. v. Chicago Pneumatic Tool Co.*, 90 F. Supp. 845, 847. It does not overcome the testimony of plaintiff's engineers, Eyolfson and Wilcox, who testified [491] that the tips of points under harsh stresses deflect as much as one and one-half inches, which, because of the heavy beam sections, is transmitted to the rear of the points, causing the tongues to come in engagement with the upper or lower surfaces of the recesses, depending upon the direction of impact and by providing a greater spacing; it is

manifest that only the stronger transverse impact will result in the tongue contact. Eyolfson testified in part:

"The Witness: That is the primary function of the tongue, to add to the stabilization. There is some stabilization accomplished by forces of friction, but in an impact blow, you don't have static friction, you get into moving friction, and it doesn't take too much for this wedge face bearing to get lost. And actually it applies to the tongues. *You see, if this moves forward just a very small amount, then any gap that's in here is very rapidly taken up. And besides that, this heavy portion here is not only there for wear but it's also to create a very strong beam.* So that when you do pivot about this, as a slight amount of separation takes place and you do pivot about this, then your tongues will come into contact as soon as possible. *It is sort of like an overload spring, Your Honor. It doesn't work unless it's needed, but it is there whenever you get the heavy blow.*" (Emphasis added). (R. 53, 54).

Wilcox testified in part:

"A. The stress was applied right out here on the tip of the point.

"Q. And where, if any place, was that stress transmitted to?

[492] "A. Well, the stress was transmitted along this upper spike portion here. The upper portion of this tooth is quite a bit heavier than the lower box structure. This is what we call the spike portion.

"Q. I hand you now Plaintiff's Exhibit 2, and perhaps you can acquaint the Court with what you mean by spike section.

"A. You can see here, Your Honor, this top part, which is called the spike portion.

"Q. That's designated 43?

"A. 42.

"Q. 42?

"A. And 43, both, yes. 42 is the top surface, 43 I believe is the edge of this surface. It's quite a bit heavier. *And this is done purposely, because this is a sort of a cantilever out here. You get your greatest forces out on the tip, and we have to have this heavy cantilever section to transmit these forces back here where they are resisted.*" (Emphasis added). (R. 198, 199).

This factual testimony from qualified engineers, to whose testimony the Court attaches more weight than to that of the patent attorney, leads the Court to the conclusion that while these three features may and could operate independently of each other, in fact, in the Baer Patent they are coactive and bring about a new and useful result, namely, added stabilization when destructive forces are applied transversely to the tip of the tongue, thereby protecting the pin against deformation. This gives the Esco (Baer) point the commercial advantage obtainable from a readily removable point. This combination is, therefore, both new [493] and useful and solves an important problem in the heavy construction industry. It constitutes invention for Claims 8 and 9 of the Baer Patent unless it can be established that all three of these features are found in the Mekeel Patent or are obvious therefrom to one skilled in the particular art at the time the invention was made.

While it might be plausibly reasoned, as Mr. Foster did, that the tongues on the adapter of the Mekeel Patent which fit into the recesses of the point are the equivalent of the tongues on the Baer point which fit into the recesses of the adapter, this is not a true equivalent because there is a difference in the strength and ability of the tongues to withstand force when the tongues are on the point rather than on the adapter. This was admitted by Mr. Foster when he said:

“There is probably a difference between the tongues extending rearwardly from the point and extending forwardly from the adapter, but it is a matter of degree and I can’t tell how much a degree.” (R. 480).

Furthermore, if the recesses are on the point, as in Mekeel, it has a disadvantage “in that you have weakened the structure by notching it out here, and it is possible that stresses will build up in this notch which will weaken the point itself.” (R. 288, 289). Another difference claimed by plaintiff and mentioned above and sustained by the evidence is the fact that the point in Mekeel was symmetrical (R. 545). Therefore, the upper and lower edge of the tongue and recess could not be substantially parallel to each other and also to the upper wedge face of the adapter nose.

Furthermore, even if it could be said that Mekeel teaches that the tongue can be on *either the point or the* [494] *adapter*, the fact remains that Mekeel *does not provide the second coactive feature of Baer, the heavy upper spike portion of the point*. The fact that the Mekeel point is symmetrical and hence reversible is not the equivalent of a heavy upper spike portion. The upper and lower faces (if there is a true upper and lower face to a reversible point) and the sides of the Mekeel point appear to be of the same thickness. Mekeel can’t give the same heavy cantilever action provided by the spiked portion of the Baer point. Hence, neither this feature nor an equivalent thereof appear in Mekeel. The fact that a heavy upper spiked portion of the tooth appeared in other prior patents which did not provide the other coactive elements of Baer does not void the Baer patent. The absence of this spiked portion of the Baer Patent alone is sufficient to defeat defendant’s claim that Mekeel anticipated Baer.

The third feature of Baer, the spacing between the point and the adapter, is not provided in Mekeel. The specifica-

tions of Mekeel when applied to figures 8 and 9 of the Mekeel Patent (see appendix) show:

"In this case, 14^a indicates the tenon formed on the nose 16^a of the base 12^a. 18^a indicates the shoulder on the nose, which is *adapted for engagement* with the base of the point 13^a when the points are assembled." (Lines 69-73 of page 2, Mekeel Patent No. 1,845,677, underscoring added.)

If the other features of Baer were present in Mekeel, this specification might not be too important in view of the testimony of plaintiff's expert that spacing would arise from usual manufacturing tolerances.

While the Mekeel Patent was never utilized, and no known manufacture resulted from which its effectiveness [495] could be evaluated, there is serious doubt that a functional operation of Mekeel would provide the desired stabilizing effect. Mr. Eyolfson testified:

"The Court: In other words you tell me there is no stabilizing effect there.

"The Witness: That's right, and what's even more important is that once that thing moves forward in any degree, it could not return because the thing would seize tremendously . . ." (R. 630)

The basic teaching of Mekeel is entirely different from that of Baer. Mekeel does not rely on tongues for additional stabilization, since a rigid lock is brought about by the expanded tenon which provides the connection between the point and the adapter. This Mekeel contribution is carefully specified in each of the Mekeel claims.

Defendant has failed to prove that what Baer did was *not new*. Defendant has also failed to prove that the differences between claims 8 and 9 of Baer and the prior art as a whole would have been obvious at the time invention

was made to a person having ordinary skill in the art to which the subject matter of these claims pertains. The Court finds that while the pertinent separate features of each of claims 8 and 9 have appeared separately in prior patents, the Court further finds that each such prior art patent has *less than the full combination of elements specified in either Claims 8 or 9*. Furthermore, none of the prior art patents teach a replaceable point where the heavy spike section transmits impact forces to rearwardly extending tongues during the deformation of the entire tooth, this teeter-totter like transmission being made possible by the spacing of the point and adapter. The Court finds that the combination of the elements found in each of Claims 8 and 9 [496] result is something new, a new coaction between elements, which would not have been obvious to one skilled in the particular art at the time invention was made. See *Radiator Specialty Co. v. Micek*, 327 F. 2d 554, 555; *Bates v. Coe*, 98 U.S. 31, 49. The failure of the art to adopt an allegedly anticipating structure is a significant indication of the novelty of Baer when he came up with a satisfactory two-part tooth that met with immediate and wide commercial success. See *Artmoore Co. v. Dayless Mfg. Co.*, 208 F. 2d 1, 4; also *Washburn & Moen Mfg. Co. v. Beat-em-All Barbed Wire Co.*, 143 U.S. 275, 282, 283.

The Court finds no misuse of Esco Model No. R.3 (the smallest assembly of point and adapter). Esco and its licensees manufacture a number of varieties of 3" size points. These points lack the previously referred to rearwardly-extending tongues. The 3" style teeth are made up of the adapter, point, pin and plug. Both the points and the adapters are marked with the patent number in suit. The Court finds that this is justified, notwithstanding the absence of the rearwardly-extending tongues, since a substan-

ially longer locking pin is used in combination with a pin-receiving recess in the point to constitute additional stabilizing means as called for under Claim 5 of the patent in suit. As the witness Wilcox testified, "the additional stabilizing means would be the fact that the pin goes all the way through the bottom, the box section here, so as to hold it on more firmly." (R. 229). In making this finding the Court is still not thereby passing upon the validity of Claim 5, since the presumption of validity alone is sufficient against a misuse defense of the character presented in this case where the misuse relates exclusively to the markings of [497] the numbers of the patent upon the manufactured pieces. Furthermore, these markings were placed on the two pieces on advice of plaintiff's patent attorney (R. 284, 285). Under such circumstances, it cannot be said that the defendant comes into court with unclean hands.

Based upon the record before it, the Court finds nothing in the conduct of the parties to justify an award of punitive damages or attorneys' fees to either party, and the same are, therefore, denied to each.

Before concluding, the Court observes that it attaches no particular weight to the teeth offered in evidence by defendant from the so-called Pleasanton operation, since there is no clear indication of the stress forces applied in that operation, and such evidence as was presented might reasonably cause one to conclude that it was a light-duty operation, a re-handling of material, as contrasted to a normal construction project.

Finally, the Court finds that the evidence does not sustain defendant's defense of file wrapper estoppel.

Based upon the foregoing, it is accordingly ordered that judgment be entered in favor of plaintiff as to validity and infringement of Claims 8 and 9 of the Baer Patent

and against plaintiff as to its claim that defendant infringed Claim 5 of said Patent by inducement. Plaintiff shall prepare findings of fact, conclusions of law and judgment consistent with this opinion.

Dated: September 3, 1965.

ALFONSO J. ZIRPOLI

United States District Judge

[498]

APPENDIX

[499]

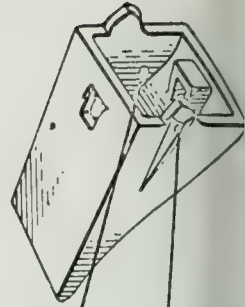
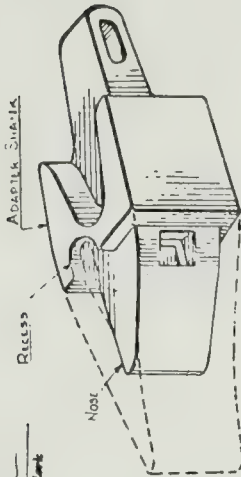
No. 39806 23A
 Filed OCT 6 - 1964
 James P. Welsh, Clerk

CLAIM 8

An excavating tooth point adapted to receive the edge-shaped nose of an adapter having upper and lower faces diverging from a substantially rounded front end portion, substantially parallel side faces, and an enlarged rear shank portion in which recesses extend from the side faces longitudinally of the nose and have substantially parallel side edges which are substantially parallel to one of said diverging faces and disposed between the planes of the diverging faces, and comprising, in combination,

a spike portion of relatively heavy section,

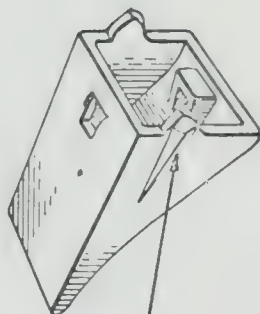
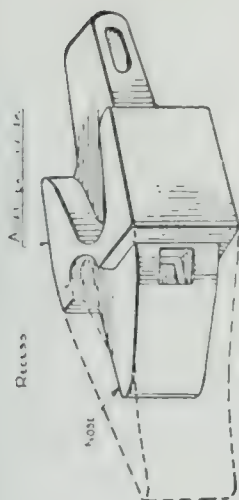
a housing portion having side walls and an integral web forming with the spike portion -



a wedge-shaped socket having an open end at one end of the spike portion, said wedge-shaped socket being of a length and shape normally and firmly to receive the wedge-shaped nose of the adapter with the space between the nose and adapter at the vertex of socket and with said spike and housing portions substantially spaced from the shank portion of the adapter, and

said side walls of the housing portion having integral projecting tongues thereon adjacent the open end of the socket, and said tongues having substantially parallel side edges adapted to fit into said recesses of the adapter shank portion when the nose is seated in the socket, thereby to support the tooth on the adapter in directions transverse

[500]



In an excavating tooth, a removable tooth point adapted to maintain firm seating engagement on an adapter having a nose with rearwardly diverging wedge faces and an enlarged sink portion in which recesses provide substantially parallel edges in parallel relationship to one of the wedge faces and displaced laterally and rearwardly of the wedge faces, and comprising, in combination,

No. 37506
Exhibit No. 24 A
Filed 6-16-1964

James P. Welsh, Clerk

By *[Signature]*
Deputy Clerk.

integral snike and housing portions together forming a wedge-shaped socket having wedge faces of an angularity substantially equal to that of the diverging adapter wedge faces and lengths such that the adapter nose is normally spaced from the socket vertex,

said housing portion having opposed and integral side tongues thereon displaced laterally of the socket wedge faces and projecting rearwardly from the housing portion, said tongues having substantially parallel edges in parallel relationship to one of the socket wedge faces and adapted to fit between the parallel edges of said recesses to provide support for the tooth point in addition to the wedge faces, and said tongues being normally too short to reach the ends of said recesses so as to prevent their interference with the seating of the wedge faces.

[503]

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 Exhibit No. BB
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 James P. Welsh, Clerk
 By P. Peterson
 Deputy Clerk

Feb. 16, 1932.

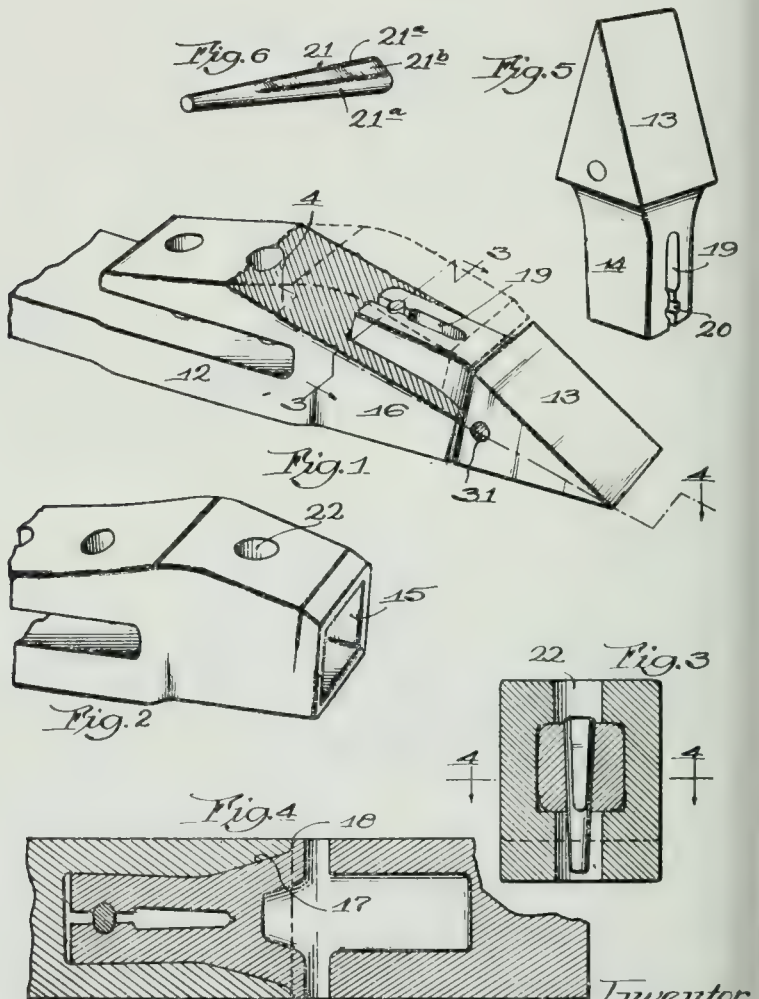
VAN CORTRIGHT MEKEEL

1,845,677

DIGGING TOOTH

Filed March 9, 1929

2 Sheets-Sheet 1



Witness:
Chas. R. Koush.

Inventor
Van Cortright Mekeel
Clark E. Hebl

[504]

Feb. 16, 1932.

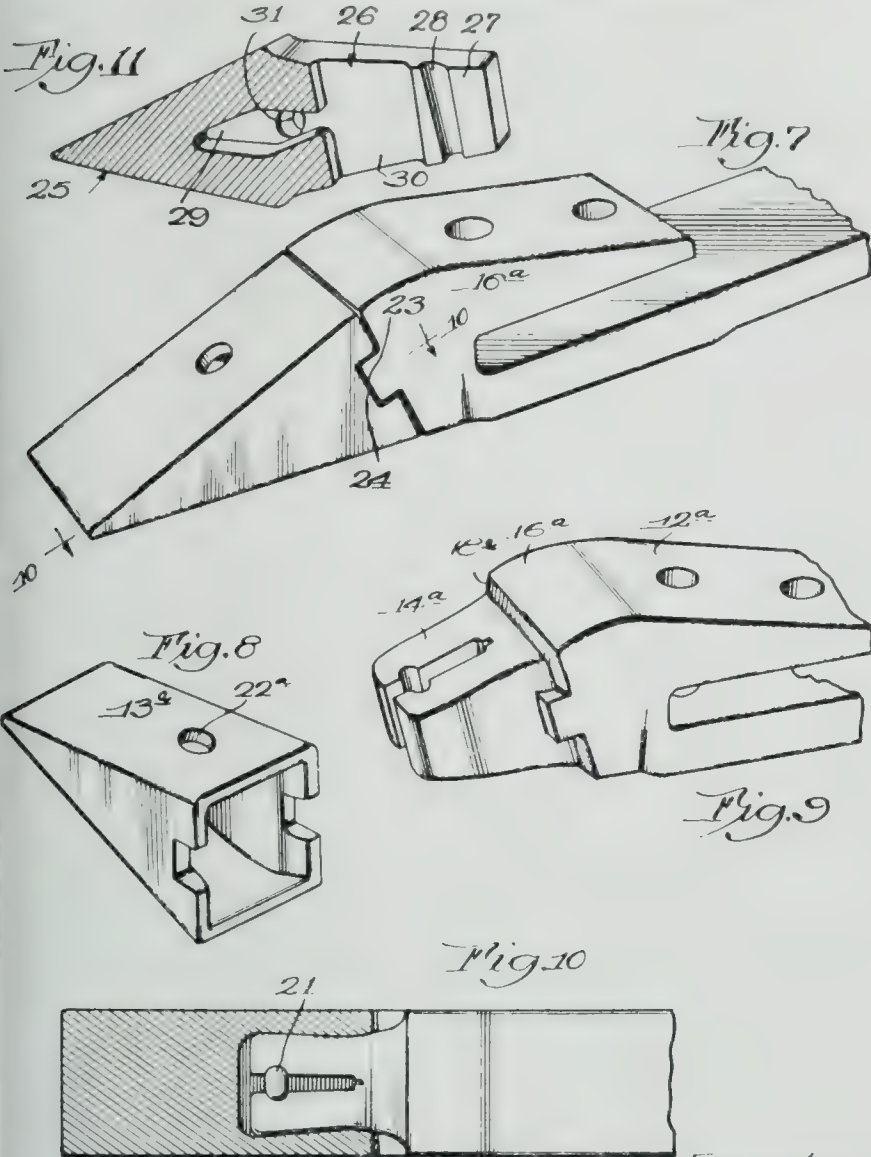
VAN CORTRIGHT MEKEEL

1,845,677

DIGGING TOOTH

Filed March 9, 1929

2 Sheets-Sheet 2



Witness:
Chas. F. Koush

Inventor:
Van Cortright Mekeel
Clarence E. Wallbridge
Attys.

FEB 14 1967

No. 20,599

United States Court of Appeals
For the Ninth Circuit

LENSLEY EQUIPMENT COMPANY, INC.,	}
<i>Appellant,</i>	
VS.	
ESCO CORPORATION,	}
<i>Appellee.</i>	

APPELLANT'S REPLY BRIEF

LEHR AND SWAIN
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FILED
AUG 9 1966
WM. B. LUCK, CLERK



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No. 20,599

United States Court of Appeals

For the Ninth Circuit

HENSLEY EQUIPMENT COMPANY, INC.,
Appellant,

VS.

ESCO CORPORATION,
Appellee.

APPELLANT'S REPLY BRIEF

Esco's brief has mischaracterized numerous statements in the record and in Hensley's brief. While many of these mischaracterizations are minor, it is felt that the more serious ones should be succinctly clarified and brought to the attention of the Court as summarily as possible.

1. With respect to its guillotine test, Esco asserts Esco Br. 6, 9, 37) that 6,000 foot-pounds of impact has been found to be a satisfactory *minimum*. At page 37 of its brief, Esco goes so far as to quote the term "minimal requirements" in describing its test. No record reference is cited in support of this quoted characterization and we think there is none. Rather, Mr. Eyolfson has stated:

"And for at least three years we have determined that for this particular size of tooth a 6,000 foot-pound level will eliminate major flaws that would cause difficulty in operation, and even though much

harder blows are withstood in operations, this seems to sort out the poor quality. And so at that level this tooth passed our *normal* proof test.” (emphasis supplied) (Rep. Tr. 63)

2. Esco asserts (Esco Br. 8, 30) that Hensley has admitted the stabilizing function of “the rearwardly extending tongues”. The actual statement of the witness cited to support this assertion is that the tongues will “probably” provide support “if they fit snugly in the recesses” (Rep. Tr. 182). It has not even been alleged that the tongues of any of the teeth in question (whether of Esco or Hensley manufacture) fit *snugly* in the recesses.

3. Esco asserts (Esco Br. 10, 31) Hensley has admitted that the “dynamic test” is the only reliable test. The actual statement at trial was that the question to be determined was whether contact results when the equipment is “in use” (Rep. Tr. 499). There was clearly no admission as to the type of test which is reliable. Moreover, Esco’s own expert, as to its guillotine test, admitted that the test was not universally accepted. Mr. Eyolfson after discussing the guillotine test, at pages 616 to 618 of the Reporter’s Transcript, concludes at page 618, “I will accept the test based upon my experience. Others may not”.

4. Esco asserts (Esco Br. 15, note 5) that Hensley’s contentions of the actual usage of Mekeel is at variance with representations made during hearing on Motion for Summary Judgment. Any apparent variance is due to Hensley’s attorney’s becoming aware of the actual usage of Mekeel (the Esco Model R-34D, Def. Ex. B) only *after*

that hearing. Esco also asserts (Esco Br. 22) that “it was admitted unqualifiedly that nothing ever came of Mekeel”. No record citation was noted for this “unqualified admission”. There was no such admission.

5. Esco proposes its “three-step logic” (Esco Br. 27) to attack Hensley’s contention that Esco’s own commercial construction did not come under the definition of Claims 8 and 9. But both the first and second premises of Esco’s “logic” are fallacious. Even if the early Hensley point did infringe the patent (Esco’s first premise) it does not follow that Claims 8 and 9 particularly were infringed. The infringement, if any, might well have been with respect to Claim 5 which was urged at the trial to be infringed by inducement. Moreover, there is no evidence that Hensley’s points were “copies” of the Esco commercial points as set forth in Esco’s second premise. Rather, the testimony is the exact converse (Rep. Tr. 71).

6. Esco partially quotes (Esco Br. 37) from *Chicago Pneumatic Tool Co. v. Hughes Tool Co.*, 97 F.2d 945, 947 (10th Cir. 1938) in such a manner as to infer that the Court there held adjacent *pyramidal* teeth to have their sides “approximately parallel” within the meaning of the claim language there involved. With such a holding it would appear that the sides of a pyramid would be “approximately parallel” within patent claim language. But there was no such holding. In the portion of the quote represented in Esco’s brief by an ellipsis, the Court states “[the teeth] are slightly larger at the base than at the cutting edge, but *they are not pyramidal* in shape; . . .” (emphasis supplied).

7. In answer to Esco's "haunting question" (Esco Br. 39) as to why Hensley kept the rearwardly extending tongues, Clyde Hensley himself has answered that the extension of the ears helps out in "appearance only" (Pl. Ex. 14, p. 49). Hensley's use of the rearwardly extending tongues is no proof of their patentability and in the absence of a *valid* patent Hensley had a right to use them. As recently stated by the Supreme Court in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964):

"What Sears did was to copy Stiffel's design and to sell lamps almost identical to those sold by Stiffel. This it had every right to do under the federal patent laws. That Stiffel originated the pole lamp and made it popular is immaterial. 'Sharing in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested.' *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938) at 122, 83 L ed at 80."

See also, *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

CONCLUSION

Esco's brief does not overcome the arguments or alter the conclusions reached in Hensley's main brief.

Dated, San Francisco, California,

August 6, 1966.

Respectfully submitted,

FLEHR AND SWAIN

THOMAS O. HERBERT

Attorneys for Appellant

FEB 14 1957

No. 20617

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. HOWARD ARNOLD

APPELLANT

VS.

WILLIAM J. McGUINNESS

APPELLEE

APPELLANT'S OPENING BRIEF

Appeal from the
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

FILED
APR 5 1957
W. L. LOCK, CLERK

J. HOWARD ARNOLD
Postoffice Box 919
Berkeley 1, Calif.

APPELLANT, pro se

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THE STATE OF NEW YORK
IN SENATE
JANUARY 18, 1901.

REPORT OF

THE COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION

PASSED BY THE SENATE, MAY 1, 1899.

ALBANY: J. B. LEECH, STATE PRINTER, 1901.

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JURISDICTIONAL BASIS

an appeal is taken from a final judgment order of the United States District Court for the Northern District of California, Southern Division sustaining a motion to dismiss the action on the ground that the complaint fails to state a claim upon which relief can be granted, under Rule 12b(6), Federal Rules of Civil Procedure. Jurisdiction of this action is based on 28 U.S. Code Section 1291.

The District Court action sought to be dismissed on motion of defendant is a damage suit for false imprisonment and other deprivation of Federal rights, conspiring to commit such deprivations, and attempting to prevent such conspiracy.

Jurisdiction of the District Court was invoked under Title 18, U.S. Code, Sections 1331 and 1343(1), (2), (3), and (4), and under Title 18, U.S. Code, Sections 1981, 1982, 1983, 1985, and 1986, as well as under Title 11, U.S. Code, Sections 27, 711, 712, 742, and 743, together with Section 110 and other sections establishing the paramount and exclusive jurisdiction of the District Court in proceedings for arrangements with creditors under Chapter XI, Title 11, U.S. Code.

The only pleading thus far filed in the District Court is the Complaint, which appears on pp. 1 to 7, Clerk's Transcript.

STATEMENT OF THE CASE

The cause of action in the damage suit arose in July, 1964, when the defendant, acting under color of his office as a judge of the Superior Court of the State of California, in and for the County of Alameda, on July 15, 1964, signed an Order to Show Cause in re Contempt directing the plaintiff to appear on July 28, 1964, and, on July 29, 1964, found him in contempt for non-appearance July 28 and sentenced him to jail for 3 days.

On July 27, 1964, Appellant filed in the Superior Court a Motion to Quash Service of Summons, under Section 416.1, of Civil Procedure. By this act, Superior Court jurisdiction was suspended by operation of law, pending determination of the Motion to Quash, and thus cancelling and annulling the hearing set for July 28, 1964. The basis for the Motion to Quash was the insufficiency of the complaint (Appellant's Declaration for Order to Show Cause in re Contempt) in failing to state facts constituting the necessary elements of a contempt.

On July 28, 1964, Appellant did not appear for the contempt hearing, which could not have been held because of the Motion to Quash. Nevertheless, Appellee issued a bench warrant (body attachment), brought Appellant into his court on July 29, 1964, sentenced him to 3 days in jail and committed him to the custody of the Sheriff, who imprisoned him for 3 days.

Appellant filed in U.S. District Court on July 30, 1965, a civil action for damages against Appellee, alleging false imprisonment, deprivation of Federal rights, conspiracy to deprive of Federal rights, and failure to prevent such conspiracy. Service of process was effected on August 24, 1965.

Appellee moved on Sept. 10, 1965, to dismiss the action under Rule 12b(6), Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted. After hearing on Oct. 11, 1965, the District Judge on that day signed an order sustaining the motion to dismiss.

Appellant filed in District Court on Nov. 10, 1965, Notice of Appeal of the order sustaining the Motion to Dismiss.

On Oct. 8, 1965, notwithstanding the damage suit against him, Appellee again signed an Order to Show Cause in re Contempt directed

[illegible][illegible]

Appellant, ordering him to appear on Nov. 24, 1965. On Nov. 23, 1965, Appellant filed a Notice of Motion to Quash Service of Summons; he did not appear for the hearing on Nov. 24. Appellee issued a bench warrant which Appellant was arrested early in the morning of Dec. 2, 1965, and jailed until 4 P.M. that day, with bail set at \$1000. On Dec. 8, 1965, the Motion to Quash was granted by another judge, and the contempt proceedings came to an end, at least temporarily. The two complaints in the 1964 and 1965 contempt proceedings were identical in essential wording, and both insufficient to charge a contempt.

SPECIFICATION OF ERRORS

The District Judge erred in granting the Motion to Dismiss hastily and superficially, without a careful determination of the alleged certainty that granting of relief on the stated claim is impossible.

The District Judge erred in denying an adjudication on the merits of the further pleadings and full hearing, in the face of serious, complex, and long too well settled questions of law, and on the basis of unwarranted inferences and presumptions against plaintiff, not against defendant.

The District Judge erred in assuming, in deciding the matter, that Appellee had authority, on the facts of the case, to render valid orders and did so with blanket immunity from liability for his acts.

The District Judge erred in presuming, with Appellee's counsel, that Appellee's erroneous judicial acts of Appellee were involved, not void judicial ministerial acts for which no immunity from liability can be claimed.

The District Judge erred in absolving Appellee of liability for his act of imprisoning Appellant for disregard of a void order, which disregard does not constitute contempt, and for failing to attend a non-sustained hearing which, under the law, could not possibly be held.

6) The District Judge erred in presuming that judicial immunity exists at all times, even when a judge makes void judicial and ministerial decisions by acting outside the scope of his statutory authority, usurping power under color of State office and ignoring the limitations imposed by Federal law.

7) The District Judge erred in deciding that redress is not available under the Civil Rights Act for Appellee's void orders depriving Appellant of his Federal rights, despite the lack of judicial immunity.

SUMMARY OF ARGUMENT

Judicial immunity from liability in civil suits for damages is limited to injuries arising from erroneous judicial acts, and does not exist where judicial acts (or void or erroneous ministerial acts) constitute the basis for the damage suit. Judicial acts are void when the judge lacks jurisdiction of the subject-matter, of the person, or of the particular case; or when he acts without statutory authorization or without regard for necessary procedural prerequisites.

In the case at bar, Appellee had no jurisdiction of the person of Appellant, no jurisdiction to proceed in the case or to render the judgment made, and no statutory authorization to imprison for contempt under the circumstances. His acts were void, not erroneous, and carry no immunity from liability for damages.

A motion to dismiss should not be granted hastily and superficially, by making unwarranted inferences favorable to Appellee, misinterpreting prior court decisions, and over-simplifying a complex question of law. This suit for false imprisonment and other deprivations of Federal rights should not be perfunctorily dismissed on invalid blanket assumptions of immunity. Relief can be granted; Appellee's acts were void.

ARGUMENT

dent (1): Judicial immunity from liability for damages limited to erroneous acts within the scope of statutory authorization; for void acts, outside the law, liability is less for a judge than for any citizen.

It is not contended in this appeal that Appellee is liable for damages as a result of erroneous judicial action within the scope of statutory authority, but that he is liable as a result of void acts outside his judicial powers and done with only a pretense of legality. Appellee's memorandum supporting his motion to dismiss (Clerk's Transcript, p. 9) cites 3 Federal and 8 California cases, ALL of them involving decisions that were merely erroneous, not void, and therefore are not in point.

"Where a judge acts in clear absence of all jurisdiction, i.e. of authority to act officially over the subject-matter in hand, the proceeding is coram non judice. In such a case the judge has lost his judicial function, has become a mere private person, and is liable as a trespasser for the damages resulting from his unauthorized acts. Honesty of purpose and sincere belief that (he) was acting in the discharge of his official duty under his oath of office and for the public welfare is not available as a defense. ."

Manning v. Ketcham (1932) 58 Fed. 2nd 948 (CA, 6th)

the Court has expressed agreement in similar language.

"When a judicial officer does an act in the clear absence of all jurisdiction and knows of the absence of such jurisdiction, his judicial immunity is pierced, but when he merely acts in excess of vested jurisdiction, the general immunity of a judicial officer remains intact..."

Johnson v. MacCoy (1960) 278 Fed. 2nd 37 (CA, 9th)

ent (2): Appellee's acts were void for lack of jurisdiction of Appellant's person, the complaint being defective.

The complaint (Declaration for Order to Show Cause in re contempt) initiating the proceeding was defective in failing to allege that Appellant was able to comply with the order, non-compliance with which was supposedly was contumacious. Ultimately, after abandonment of the 1964 contempt action and its renewal in 1965 with a similar Declaration, the prior Court granted Appellant's motion to quash the Order to Show Cause because of the defect in the Declaration. In both proceedings, 1964 and 1965, Appellee attempted vigorously to hold the main contempt hearing prior to determination of the motion to quash, and therefore without the essential jurisdiction of the person of the defendant.

"If the affidavit filed with the trial court does not state facts sufficient to charge a contempt of court, that court would not have jurisdiction of the person therein sought to be charged with contempt."

Pennell v. Sup. Ct. (1927) 87 Cal. App. 375 at 377

lack of jurisdiction of the person renders the judgment void.

"A judgment for contempt of court, such as involved here, is as absolutely void, if there was no jurisdiction of the person against whom it was pronounced, as it would be if the court, imposing the sentence had no jurisdiction whatever of the subject-matter... entire lack of jurisdiction of the person is just as fatal to the judgment as entire lack of jurisdiction of the subject-matter. The absence of either element of general jurisdiction of the subject-matter or person makes void a judgment of a judicial officer."

Pomeranz v. Class (1927) 82 Cal. 173, 257 Pac. 1086

California courts agree that without jurisdiction of the person the judg-

is void and the judge is liable for damages.

"The record of the proceedings in the case shows that no jurisdiction had been acquired of the person of the plaintiff, and the judgment was therefore, as to him, coram non judice. The judgment being a nullity, the only remaining question is as to the liability of the (appellee), and on this point we have as little doubt as on the other."

Inos v. Winspear (1861) 18 Cal. 397

"If a judicial officer has no jurisdiction of the person, the officer acts as an individual and not as an officer."

Ceinar v. Johnston (1933) 134 Cal. App. 166

Effect, there was no valid Order to Show Cause, Appellant was not before the court for any purpose, and service of process had not occurred.

"It is admitted, that the service of process, or notice, is necessary to enable a court to exercise jurisdiction in a case; and if jurisdiction be taken, where there has been no service of process, or notice, the proceeding is a nullity. It is not only voidable, but it is absolutely void."

Walden v. Craig's Heirs (1840) 39 U.S. (14 Pet.) 147 at 154

Point (3): Appellee's acts were void for lack of jurisdiction of the subject-matter for the particular case at bar.

Whether a judge has jurisdiction of the subject-matter is determined by the nature of the case and the statutes conferring and limiting his authority.

"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be

sought for in the general nature of its powers, or in authority specially conferred. . The power to render the decree or judgment which the court may undertake to make in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause."

Cooper v. Reynolds (1870) 77 U.S. 308 at 316 (10 Wall.)

"Jurisdiction of the subject-matter is the power to deal with the general subject involved in the action, and is conferred upon the court by law."

Glacken v. Andrew (1918) 69 Okl. 61, 169 Pac. 1096

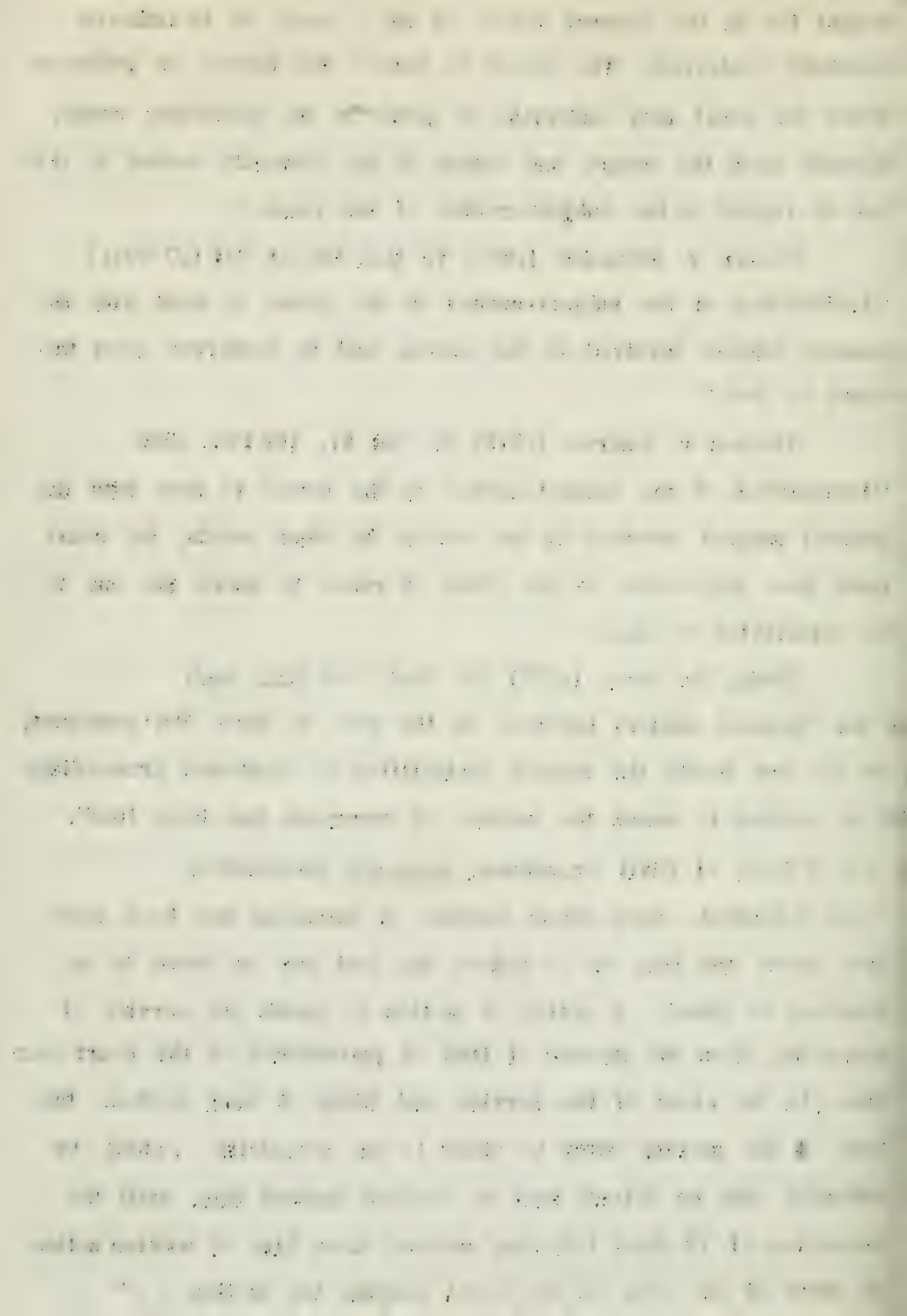
"Jurisdiction of the subject-matter is the power to deal with the general subject involved in the action. In other words, the court must have cognizance of the class of cases to which the one to be adjudicated belongs."

Craig, Ex parte (1922) 282 Fed. 158 (CA, 2nd)

What is the 'general subject involved' in the case at bar? Not 'contempt', for, as the law limits the court's jurisdiction to 'contempt proceedings in which no motion to quash the service of summons has been filed'.

Section 416.1, Code of Civil Procedure, suspends jurisdiction:

"Any defendant. . upon whom service of summons has been made may serve and file, on or before the last day on which he is required to plead. . a notice of motion to quash the service of summons, upon the ground of lack of jurisdiction of the court over him. . In the event of the service and filing of such motion, the time of the moving party to plead to the complaint . . shall be extended, and no default may be entered against him, until the expiration of 10 days following service upon him of written notice of entry of an order of the court denying the motion . . ."



g of the Notice of Motion to Quash on July 27 automatically extended time to plead to the complaint, thus prohibiting by operation of law scheduled hearing of July 28, and suspending the jurisdiction of the over this class of contempt proceedings pending determination of the on to quash. The bench warrant of July 28, the hearing of July 29, and the commitment of Appellant to jail for 3 days were all unlawful, as July 28 and 29 the court had no jurisdiction of the subject-matter and was not authorized to proceed. Appellee's punishment of Appellant for non-appearance at a hearing which the law forbade to be held was unlawful.

"It is urged...that he had authority to punish the plaintiff for contempt, although he had no jurisdiction to try the principal case before him. But the answer to this suggestion is obvious. The power to punish for contempt is only incidental to the more general and comprehensive authority conferred on a magistrate, by which he is empowered to exercise important judicial functions. . . But it is only when he is in the proper exercise of his judicial functions, that this power can be exercised. If he has no jurisdiction of a cause, he cannot sit as a magistrate to try it, and is entitled to no protection while acting beyond the sphere of his judicial power. His act is then extrajudicial and void. His power and authority are commensurate only with his jurisdiction. If he cannot try the case, he cannot exercise a power which is only auxiliary and incidental. There can be no contempt, technically speaking, where there is no authority. In the case at bar, the defendant had no more power to entertain jurisdiction of the complaint . . . than any other individual in the community. Although he acted through mistake, it was nevertheless a usurpation. The plaintiff therefore could not have been guilty of contempt toward the defendant in his cap-

acity as a magistrate, while trying a cause of which he had no jurisdiction; and the commitment therefor was unauthorized and void."

Piper v. Pearson (1854) 2 Gray (18 Mass.) 120, 61 Am.Dec.438

pellee therefore lacked lawful authority to hold the main contempt hearing as originally scheduled by the Order to Show Cause, or to punish Appellant for his non-appearance at that time.

int (4): Jurisdiction of the particular case is essential to a valid judgment, in addition to jurisdiction of person and subject-matter.

he term 'subject-matter' is given a broad meaning, the rule sometimes stated, that jurisdiction of person and subject-matter suffices to make the judgment no more than erroneous (never void), must be revised, allow for further statutory limitations.

"This court has held that jurisdiction embraces three essential elements: (1) jurisdiction of the subject-matter, (2) jurisdiction of the person, and (3) jurisdiction of the particular case."

State v. Reeves (1955) 234 Ind. 225, 125 NE 2nd 794

"...a court in acquiring jurisdiction must not only have jurisdiction of the parties and the general subject of the controversy, but ...must have jurisdiction of the subject-matter of the particular case. . A failure to comply with the statute is jurisdictional. ."

Ballman v. Duffey (1952) 230 Ind. 220, 102 NE 2nd 646

or the court to have 'jurisdiction of the particular case', it must observe statutory limitations specially applicable to that case, and thus have authority to render the particular judgment given. A court having jurisdiction of contempts generally is nevertheless restricted in some cases rendering judgment at a time limited by the quashing statute.

"A court has no jurisdiction to hear or determine a case where the type of proceeding . . is beyond the jurisdiction defined for that particular court by statute or constitutional provision. . though the court has jurisdiction over the subject-matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner."

Abelleira v. Dist. Ct. of Appeal (1941) 17 Cal. 2nd 280

"It is now settled that jurisdiction over the person and subject-matter is not alone conclusive, but that the jurisdiction of the court to . . render the . . judgment that serves as the basis of the imprisonment is a proper subject of inquiry. Stated another way, jurisdiction to render the particular . . judgment in question is deemed as essential as is jurisdiction of the person or subject-matter. . The trial court, although it may have had jurisdiction of the person and subject-matter, had no jurisdiction to convict and sentence the petitioners for offenses based wholly or in part on an unconstitutional statute."

Bell, In re (1942) 19 Cal. 2nd 488 at 532

The case at bar arose when Appellee undertook to render judgment at a time when his jurisdiction (if any he had) to do so was suspended pending decision of the motion to quash. To ignore a valid statute is as fatal to the validity of the judgment as to utilize an unconstitutional one.

A motion to quash the summons (i.e., the order to show cause) is proper in contempt proceedings.

Grant v. Sup. Ct. (1963) 214 Cal. App. 2nd 15

Parker v. Sup. Ct. (1926) 79 Cal. App. 2nd 618.

Quashing is a proper remedy in either civil or criminal proceedings, under Sec. 416.1, Code of Civil Procedure or Sec. 995-996, Penal Code.

The rule that jurisdiction of the parties and subject-matter
offices to prevent a void judgment may still be salvaged and applied
the case at bar correctly by careful restriction of the meaning of
subject-matter' to designate not the general, unlimited class but

"... the class of cases to which the particular case belongs..."

State v. Wolever (1891) 127 Ind. 306, 26 NE 762

Lovett v. Lovett (1927) 93 Fla. 611, 112 So. 768 at 775

Munday v. Vail (1871) 34 N.J. Law 418

Regardless of the definition of 'jurisdiction of the subject-matter', the
fundamental requirement is that the court obey statutory limitations
pertinent to the particular case before it.

"But proceedings outside the authority of the court, or in violation
or contravention of statutory prohibitions, are, whether the court
have jurisdiction of the parties and subject-matter of the action
or proceedings, or not, utterly void... The mere fact that the court
has jurisdiction of the subject-matter of an action before it does
not justify an exercise of a power not authorized by law, or a
grant of relief to one of the parties the law declares shall not be
granted. If the court may do so under the guise of 'jurisdiction
of the subject-matter', then it may commit all sorts of depreda-
tions upon the rights of parties, particularly in default cases.
'Jurisdiction of the subject-matter' means, not only authority to
hear and determine a particular class of actions, but authority to
hear and determine the particular questions the court assumes to
decide."

Sache v. Gillette (1907) 101 Minn. 169, 112 NW 386, 11 LRA 803

Michel v. Williams (1936) 13 Cal. App. 2nd 198

When 'jurisdiction of the subject-matter' is loosely defined without strict

conformity to the law governing the particular case, it may become a leading criterion of judicial immunity from liability.

“... the judicial officer, in order to entitle himself to claim the immunity that belongs to judicial conduct, must restrict his actions within the bounds of his jurisdiction. Jurisdiction has been defined to be ‘The authority of the law to act officially in the particular matter at hand’ (Cooley on Torts, 417).”

Frazier v. Moffatt (1951) 108 Cal. App. 2nd 379 at 386

“The true measure of judicial immunity is not whether the judge had a jurisdiction of the subject-matter’, arbitrarily defined, but whether he complied with applicable law; if the definition is correct, the two criteria are identical.

“Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law... The judgments... would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases...”

Windsor v. McVeigh (1876) 93 U.S. 274 at 282

“Of the essentials to jurisdiction, the first is a court having legal cognizance of the question in controversy. A court is a place where justice is legally administered. This first essential of a legal court being lacking, the defendant has had no trial under the laws of the land. For the same reason it cannot be said that the judgment may be upheld because the judicial officer had jurisdiction of the offense and offender... A de jure judge of a legally

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constituted court can only exercise his jurisdiction in the manner prescribed by law."

Giambonini, Ex parte (1897) 117 Cal. 573

"... the judgment of a state court is void either because that court lacked jurisdiction of the subject matter or of the parties to the action, or because it entered a judgment which it had no power to enter under the law..."

Daniels v. Thomas (1955) 225 Fed. 2nd 795 (CA, 10th)

is evident that Appellee failed to exercise his jurisdiction lawfully, entered a premature and void judgment, committing Appellant to jail in a proceeding over which the law gave him no power whatever to act. Point (5): By repeating the same sequence of void acts in 1965 as in 1964, after filing of this damage suit had disqualified him from further action involving Appellant, Appellee supplied a new cause of action for damages.

Section 170, Code of Civil Procedure, provides in pertinent part that

"No justice or judge shall sit or act as such in any action or proceeding: 1. ... in which he is interested. ..."

Instead of declaring his disqualification as the statute requires and withdrawing from Appellant's divorce action, Appellee proceeded to sign a second Order to Show Cause in re Contempt, again based on an insufficient affidavit; to issue a bench warrant and cause Appellant's arrest for non-appearance at the scheduled contempt hearing, after filing of a motion to quash; and to imprison him falsely for one day on said void bench warrant. Appellee ceased his efforts to bring the main contempt matter to hearing prior to determination of the motion to quash only when Appellant produced in court an Affidavit of Disqualification.

"Section 170 of the Code of Civil Procedure in emphatic language says that no judge disqualified by reason of his interest therein shall 'sit or act as such in any action or proceeding'. He has no jurisdiction to render a judgment in such an action. . . If, therefore, the judge rendering the judgment was without jurisdiction in the proceeding, his action was a nullity."

Cadenasso v. Bank of Italy (1932) 214 Cal. 562

Johnson v. German-American Ins. Co. (1907) 150 Cal. 336

Disqualification under Section 170(1) cannot be waived by a party, but makes all judgments void.

Mayo v. Beber (1960) 177 Cal. App. 2nd 544

"If a judge is disqualified as a matter of law, every order entered by him is void. . . when the facts are without substantial conflict the question of disqualification is one of law. . ."

Briggs v. Sup. Ct. (1932) 215 Cal. 336

Judicial determination of disqualification is required here.

"... a judgment rendered by a disqualified judge is void. . It is true that where the grounds for disqualification are disputed, the facts constituting it must be judicially established by the proper procedure. . . Here, however, there is no dispute, and no facts to ascertain. The ground for disqualification appears on the face of the record, and the disqualified judge declares the fact himself. There would seem to be no escape from the conclusion that the order granting a hearing was void and that the order setting it aside was proper."

Giometti v. Etienne (1934) 219 Cal. 687

Leave of court to file a supplementary pleading covering the 1965 acts
Appellee will therefore be requested.

point (6): A motion to dismiss is a drastic remedy, to be used only where impossibility of relief is a certainty. Dismissal on a plea of blanket judicial immunity is not justified in this case, which should be heard more fully.

Summary dismissal on motion of this case appears unjustified, Appellee's judicial immunity being evidently non-existent.

"A broad holding that all state officials enjoyed immunity would be an improper approach. If courts held that all state officials had immunity from liability under Civil Rights actions for all acts done or committed within the ostensible scope of their authority, this would practically constitute judicial repeal of the Civil Rights Act. Repeal is the responsibility of Congress, not the courts."

Hoffman v. Holden (1959) 268 Fed. 2nd 280 (CA, 9th)

Further argument on the impropriety of perfunctory dismissal appears pp. 17-20, Clerk's Transcript, and will not be repeated here.

CONCLUSION

Appellee's acts were void, not merely erroneous, for failure to comply with applicable law; judicial immunity is absent. The Complaint states a claim upon which relief can be granted. The District Judge's order sustaining the motion to dismiss should be reversed, and leave granted to file a supplementary pleading covering a new cause of action.

April 25, 1966.

Respectfully submitted,

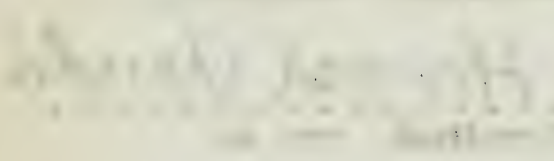
J. Howard Arnold
Appellant, pro se

THE STATE OF NEW YORK
IN SENATE
JANUARY 10, 1894.
REPORT
OF THE
COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
MAY 1, 1893.

ALBANY:
J. B. LEECH, STATE PRINTER,
1894.

THE LAND OFFICE
OF THE STATE OF NEW YORK
HAS THE HONOR TO ACKNOWLEDGE
THE RECEIPT OF THE
REPORT OF THE COMMISSIONERS
OF THE LAND OFFICE
FOR THE YEAR 1893,
AND TO STATE THAT THE SAME
HAS BEEN FILED FOR
RECORD IN THE
OFFICE OF THE CLERK OF THE SENATE.

IN WITNESS WHEREOF,
I HAVE HEREUNTO SET MY HAND
AND THE SEAL OF THE OFFICE
OF THE CLERK OF THE SENATE
AT ALBANY, NEW YORK,
THIS 10TH DAY OF JANUARY, 1894.

CLERK OF THE SENATE.


FEB 14 1967

Civil No. 20617

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

J. HOWARD ARNOLD,	<i>Appellant,</i>
VS.	
WILLIAM J. MCGUINESS,	<i>Appellee.</i>

APPELLEE'S BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

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District Attorney of the County
of Alameda, State of California

RICHARD J. MOORE,
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Deputy District Attorney
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FILED

MAY 27 1966

WM. B. LUCK, CLERK



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Civil No. 20617

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

H. HOWARD ARNOLD,

Appellant,

VS.

WILLIAM J. MCGUINNESS,

Appellee.

APPELLEE'S BRIEF

**APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.**

Pursuant to 28 U.S.C.A., Section 1331, 28 U.S.C.A.,
Rule 18, 9th Circuit, this reply to Appellant's Opening
Brief is hereby filed before this Honorable Court.

FACTS OF THE CASE

The Appellee herein feels that the statement of
the facts in this case as contained in the Appellant's
Opening Brief (pages 1-3) fails to give a complete
background of the case at bar, and, for that reason,
the Appellee believes that the following exposition
would be of assistance to this Honorable Court:

In 1961, the Appellant's wife filed an action for divorce in the Superior Court of the State of California in and for the County of Alameda. Both parties to the action were domiciled in Alameda County at the time. The Appellant was duly served in Alameda County, answered the complaint, and appeared in his own behalf at the subsequent trial.

Some six months after the initiation of this divorce action, the Appellant filed a petition for a Creditors' Arrangement in the Federal Bankruptcy Court without informing that court of the pending divorce action; this Arrangement was later set aside by the United States District Court. The Appellant did not inform the Alameda County Superior Court of this action until such time as that court, at the conclusion of the divorce trial, awarded custody of the children and of the family dwelling to the Appellant's wife. The Appellant then sought to allege that the court lacked jurisdiction to so award the house since at the moment he filed his petition for the Creditors' Arrangement the Superior Court was "automatically" divested of all jurisdiction—without his applying for a stay of proceedings, without notice of any kind to the Superior Court, and, as it developed, without any merit to the contention.

The Appellant then appealed the divorce to the California District Court of Appeals. That Court's opinion in the case is attached hereto as Appendix "A." That Court resolved the question of jurisdiction firmly against the Appellant.

Subsequently, the Appellant's former wife applied to the Alameda County Superior Court for a Show Cause Order to exclude the Appellant from the family dwelling, which he refused to leave. Judge Bostick of the Alameda County Bench signed the Order and found the Appellant in contempt of Court after a hearing and confined him to the County Jail. Thereafter, the Appellant filed an action in the United States District Court seeking money damages against Judge Bostick, claiming that the Judge had acted in the absence of all jurisdiction. The District Court sustained the Judge's motion to dismiss.

The Appellant then appealed that decision to this Honorable Court, which agreed with the California District Court of Appeals' decision on the subject of jurisdiction in an opinion which is attached hereto as Appendix "B." Later, the United States Supreme Court refused to grant the Appellant's Petition for Writ of Certiorari in that matter, after this Court had denied his Petition for a Rehearing.

In 1964, the Appellant's former wife was once again compelled to seek redress from the Alameda County Superior Court as a result of the Appellant's continued refusal to obey that Court's orders which it validly made as an incident to the entry of its final divorce decree. The Appellee herein signed an Order to Show Cause directing the Appellant's appearance on a date certain. Upon his failure to appear, a body attachment was issued, and the Appellant was again jailed after being found in contempt of Court.

Following his release, the Appellant filed this action against the Appellee, again seeking money damages in the United States District Court. The Appellee filed a Motion to Dismiss, which was granted on October 11, 1965. This appeal followed.

SUMMARY OF ARGUMENT

Both this Honorable Court and the California District Court of Appeals have held that the Alameda County Superior Court has had and presently continues to have proper jurisdiction to enforce its decrees in the case of Arnold vs. Arnold, which jurisdiction was not interrupted by the Appellant filing a petition for a Creditors' Arrangement in Bankruptcy nor "suspended" by his filing of a Motion to Quash the Order to Show Cause issued by the Appellee against the Appellant.

Judges are immune to liability for damages in civil actions even for their erroneous acts and the Motion to Dismiss is the proper remedy in Federal Courts to be applied to complaints seeking such damages from judicial officers.

ARGUMENT

I.

THE SUPERIOR COURT'S CONTINUING JURISDICTION OVER THE CASE BEFORE IT WAS NOT AFFECTED BY THE APPELLANT'S ACTION.

In the present case, the Appellant once again seeks to strip the Alameda County Superior Court of jurisdiction and, at the same time, hold a duly qualified

Judge thereof liable in a civil action for money damages.

Paragraphs II, III, and X of the Complaint on file herein allege a "status" for the Appellant as a "debtor in possession" of certain property which the Alameda County Superior Court awarded to Mrs. Arnold upon the granting of a divorce to the Appellant's former wife.

Despite the California District Court of Appeals' and this Honorable Court's decisions to the contrary (see Appendices "A" and "B"), the Appellant still maintains that the Alameda County Superior Court lacks and has lacked jurisdiction. As a result, the Appellant contends that the shield of judicial immunity is to be stricken from the Appellee and that he is to answer the Complaint on file.

Quite simply, this Honorable Court has decided that the mere act of filing a petition for Creditors' Arrangement in and of itself did not deprive the Alameda County Superior Court of jurisdiction in this case. (*Arnold vs. Bostick*, 339 Fed. 2d 879; Appendix "B.") The Appellant's Petition for Writ of Certiorari to the United States Supreme Court was denied at 382 U.S. 858 and the opinion of this Honorable Court stands in the Federal judicial system as dispositive of the jurisdictional issue involved.

And still the Appellant persists.

He prefers to ignore not only the settled issue of jurisdiction by seeking to raise its emaciated specter

again in this action, but he also ignores whatever other possible remedies he may have under the laws of the State of California to have his contempt commitment reviewed at an appellate level.

He desires only money damages from a Judge of the Superior Court.

He admits in paragraphs V and VI of his Complaint that he was served on July 15, 1964, with an Order to Show Cause in re Contempt which was set for hearing on July 28, 1964. He also admits therein that he ignored that order, which, to his way of thinking, was apparently no longer valid since he had filed a Motion to Quash under Section 416.1 of the California Code of Civil Procedure.

It is quite elementary that under Section 139 of the Civil Code of the State of California "in a divorce action, the court has *continuing* jurisdiction . . . insofar as alimony or support payments for the wife are concerned." (Emphasis added.) (*Duque vs. Duque*, 155 Cal. App. 2d 142, 144.) This means that as applied to this case, the Superior Court of Alameda County acquired jurisdiction over both parties to the divorce action of Arnold vs. Arnold when the Plaintiff filed her Complaint and it was served upon the Appellant and he filed his Answer thereto. Obviously, as this Honorable Court has stated, this jurisdiction remained uninterrupted by the Appellant's scheme of filing a petition for a Creditors' Arrangement in Bankruptcy. Once the Appellant submitted himself in 1961 to the Jurisdiction of the Superior Court, that jurisdiction

to enforce its orders against him continued “. . . for all the subsequent proceedings.” (Code of Civil Procedure, Section 416.)

If the Appellant seeks to resist valid orders of the Superior Court, he must expect to run the risk of being found in contempt. If he seeks relief from what he considers harsh or unjust alimony and/or child support payments, he has a remedy available to him other than an attempt of this sort to seek damages from a Superior Court Judge:

“Certainly, it cannot be disputed that ‘the trial court entering the decree still retains jurisdiction to modify its orders if circumstances warrant the change, and the proper procedure for a party who is unable to comply with an order for the payment of alimony or the support of his minor children is to seek a modification of the order—not to resist its enforcement, thereby subjecting himself to contempt proceedings’.” *Bratnobar vs. Bratnobar*, 48 Cal. 2d 259, 263; See also: *Bailey vs. Superior Court*, 215 Cal. 548; *Woolams vs. Woolams*, 115 Cal. App. 2d 1.

There is no allegation in the Complaint on file herein that the Appellant chose to seek a modification of the order to pay One Dollar (\$1.00) per year alimony to his wife and Fifty Dollars (\$50.00) per month child support for each of his children, which award the District Court of Appeals found to be quite fair in view of the Appellant’s education, training, and earning capacity. (See Appendix “A,” page 25.)

However, the Appellant sought to “suspend” the Court’s jurisdiction by filing a Motion to Quash under Section 416.1 of the Code of Civil Procedure.

This section of the Code was enacted in 1955 to allow a defendant who had been served with a summons in an action to contest the court’s jurisdiction without subjecting himself to that jurisdiction by a finding that he made, in effect, a “general” or “special” appearance.

This section follows Section 416 of the Code which states that the court is deemed to acquire jurisdiction of the parties upon service of summons and complaint. Both these sections are part of Title V of Part 2 of the Code of Civil Procedure, entitled “Manner of Commencing Civil Actions.” The Motion to Quash provides a remedy available at the *start* of a civil action, not during the course of one after the defendant submits himself to the court’s jurisdiction. In short, the Superior Court already *had* jurisdiction, and this issue was settled at two separate appellate levels.

As the Supreme Court of California puts it:

“The obvious purpose of sections 416.1 and 416.3 is to permit a defendant to challenge the jurisdiction of the court over his person without waiving his right to defend on the merits by permitting the default to be entered against him *while the jurisdictional issue is being determined.*” (Emphasis added.)

Hartford vs. Superior Court, 47 Cal. 2d 447, 452.

Here the jurisdictional issue had been previously determined. The Appellee knew this from the contents of the file before him which contained a copy of the District Court of Appeals' decision in the case of *Arnold vs. Arnold* (Appendix "A"). Needless to say, the Appellant also knew it, although he may still have refused to believe it.

In a proper situation in which the services of Section 416.1 are utilized, there is no "suspension" of jurisdiction, since the clear intent of the statute is to determine whether or not jurisdiction properly exists prior to the time in which the defendant should plead to the complaint on file against him. However, once he files his answer or other pleading, he has submitted himself to the court's jurisdiction as Section 416 points out. He can no longer seek to quash the summons. The Appellant herein already had submitted himself to the Superior Court's jurisdiction when he filed his Answer to the divorce action initiated in 1961, which jurisdiction was continuous and uninterrupted throughout all phases of the case from the time of his Answer to the present.

II.

THE APPELLEE PROPERLY ACTED IN THE MATTER BEFORE HIM, ESPECIALLY IN LIGHT OF THE SETTLED JURISDICTIONAL ISSUE AND IS NOT LIABLE EVEN IF HIS ACTION WAS ERRONEOUS.

If this Honorable Court were to assume that the Appellant's contentions are correct in that his filing of a Motion to Quash "suspended" the jurisdiction of the Alameda County Superior Court, then he still could not maintain this action. As the Appellant himself points out (Appellant's Opening Brief, Page 5) and as the law states:

"When a judicial officer does an act in the *clear* absence of *all* jurisdiction and *knows* of the absence of such jurisdiction, his judicial immunity is pierced, but when he merely acts in excess of vested jurisdiction, the general immunity of a judicial officer remains intact . . ." (Emphasis added.)

Johnson v. MacCoy, 278 Fed. 2d 37;

See also:

Bradley v. Fisher, 80 U.S. 335;

Randall v. Brigham, 74 U.S. 523;

Barr v. Matteo, 360 U.S. 569;

White v. Towers, 37 Cal. 2d 727;

Hardy v. Vial, 48 Cal. 2d 577.

Where is the "clear" absence of "all" jurisdiction "known" by the Appellee in this case? At the very most, if all jurisdiction were lacking here, the Appellee's act was an erroneous one in believing that his court still retained jurisdiction of the matter, for which erroneous act there is no civil liability, as the Appellant himself concedes (Appellant's Opening Brief, Page 5).

On the contrary, the Appellee at the time he found the Appellant in contempt had before him the civil file of *Arnold v. Arnold*, which file contained an opinion from the District Court of Appeals for the State of California (See Appendix "A") which clearly settled the jurisdictional question against the Appellant. As far as the Appellee, or any other judicial officer similarly situated, did know or could know, there was no unresolved or even doubtful question of jurisdiction in the matter before him. The Appellee had validly issued his Order to Show Cause which was duly served on the Appellant. That order directed the Appellant to appear in court at a time and date certain and at *that* time "show cause" why he should not be found in contempt. The Appellant chose to ignore that order. Certainly, he could have appeared at that time and stated whatever objections he had, be they of a general, jurisdictional, or procedural nature.

There is no issue raised herein of the power of the court to punish by contempt those who disobey ". . . any lawful judgment, order, or process of the court." (Code of Civil Procedure, Section 1209 [5]). Nor is there any doubt that the penalty for failure to obey a show cause order is imprisonment:

“Petition for Writ of Habeas Corpus. It appears from the record that petitioner is held by the sheriff of the City and County of San Francisco under an order of arrest issued out of the Superior Court for failure to obey an order duly served upon him requiring that he appear and show cause why he should not be punished for failure to obey a previous order with reference to the payment of alimony. The court had full authority to make the order in question.

The petition is denied.”

In re Grigoris, 98 Cal. App. 337, 338.

As far as the Appellee could see, his validity issued order had been disobeyed; hence, the Appellant was jailed. Whether the complaining affidavit leading to the issuance of the show cause order was defective or not was a question to be determined on the date set for hearing of the order; the Appellee was quite justified in issuing his order under Section 1211 of the Code of Civil Procedure:

“When the contempt is not committed in the immediate view and presence of the court . . . an affidavit shall be presented to the court or judge of the facts constituting the contempt . . .”

Here, assuming that the Appellant refused to pay the child support and/or alimony which the Court had ordered him to pay, which order the Appellate Court had affirmed, the person to whom this duty was owing could and did swear out an affidavit informing the

Court that there was probable cause that a contempt of the Court's directions had been committed. Were the Appellee to ignore the request or attempt to decide on his own whether or not the affidavit was defective in some manner, he would be guilty of a serious breach of ethical conduct at the very least. His issuance of the Show Cause Order in response to the affidavit served to notify the Appellant that complaint had been made of his conduct in the matter at hand and that he (the Appellant) would have an opportunity at the time and date specified in the order to present his side of the controversy, and, if he chose, to attack the sufficiency of the affidavit.

Instead, the Appellant chose to ignore the Court's directive, and now seeks to have the Appellee answer a Complaint for money damages for acting in the manner which the law demanded of him.

And yet, even if the Appellant had been jailed for contempt when the basis for issuing the Order to Show Cause was founded upon a faulty affidavit which somehow served to divest the Appellee of jurisdiction, it is still clear that the judicial action taken against the Appellant was at most the result of an error on the Appellee's part, which does not render him liable to an action for damages.

Unless the Appellant's purpose in filing his Motion to Quash was to obstruct the lawful process of the Superior Court in seeking to enforce its orders and decrees, the only plausible reason for the Appellant's action would be to attempt to raise the issue of juris-

diction once more in this fashion. That issue is firmly settled. Whatever other possible motive lay behind the Appellant's filing of this motion is not revealed by the record.

It is quite clear in such a case that the Motion to Dismiss is the proper remedy to be applied to such a complaint.

Arnold v. Bostick, 339 Fed. 2d 879;

Rudnicki v. McCormack, 210 Fed. Supp. 905;

Blumenthal v. Girard Trust Co., 141 Fed. 2d 849;

Braugh v. Birmingham, 49 Fed. Supp. 229;

Tahir Erk v. Glen L. Martin Co., 116 Fed. 2d 865.

III.

THIS HONORABLE COURT IS CONFINED TO THE RECORD ON APPEAL AND SHOULD NOT CONSIDER SUBSEQUENT ACTIONS COMPLAINED OF BY THE APPELLANT.

The Appellant attempts throughout his Opening Brief to introduce new matter into the record on file herein relating to another Show Cause Order granted by the Appellee after this case at bar had been dismissed in the District Court. It is elementary that this cannot be allowed:

“It is a general rule . . . that an appellate court can consider nothing that is not contained in the record, and will decide the case and the questions raised only on the basis of the record presented.”

4A C.J.S., Sec. 1206, Pg. 1329.

See also: *Congress Spring Co. v. Knowlton*, 103 U.S. 49,

And cases cited at 4A C.J.S., Sec. 1206, Pg. 1329.

Undoubtedly the Appellant wishes to demonstrate that the Appellee committed a “void” act in this case, as opposed to what is at most an erroneous act—a possibility that seemingly does not occur to the Appellant—since the later Show Cause Order was dismissed due to a defect in the supporting affidavit. Perhaps it would be desirable for this Honorable Court to decide this later action at this time if it could and to do so properly in favor of the Appellee so as to spare him the indignity of another action in the United States District Court at a future date by this Appellant; however, as is manifest, this Honorable Court’s deliberations must be confined to the record before it and to the facts constituting the cause of action contained in the Complaint on file.

For these and the foregoing arguments, it is respectfully submitted that the Motion to Dismiss this action granted by Judge Harris was proper and it should be sustained by this Honorable Court.

Dated: May 24, 1966.

J. F. COAKLEY

District Attorney of the County
of Alameda, State of California

RICHARD J. MOORE

Assistant District Attorney

THOMAS J. FENNONE

Deputy District Attorney

Attorneys for Appellee

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

THOMAS J. FENNONE

Attorney for Appellee

APPENDIX

APPENDIX "A"

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

1 Civil No. 21272 — 1 Civil No. 21298

FRANCES KELLY ARNOLD, <i>Plaintiff and Respondent,</i> VS. J. HOWARD ARNOLD, <i>Defendant and Appellant.</i>
--

Defendant J. Howard Arnold appeals in propria persona from an interlocutory decree of divorce, and from an order temporarily excluding him from the family dwelling.

On November 29, 1961, plaintiff Frances Kelly Arnold filed her complaint for divorce upon the ground of extreme cruelty. She sought custody of the parties' four minor children, alimony, child support, and all of the community property. Defendant's answer denied extreme cruelty to plaintiff and prayed that a divorce be denied on the grounds of condonation and recrimination.

Appellant must remember that where there is a conflict in the evidence, a finding by the trial court based thereon is binding on the appellate court.

We are satisfied from our reading of the record that the evidence produced on behalf of plaintiff amply supports the trial court's findings that during the past seven years defendant had wilfully inflicted upon plaintiff a course of great and grievous mental pain and suffering without any cause or provocation on the part of plaintiff; that plaintiff was a fit and proper person to have the care, custody and control of the minor children; that the community property consisted solely of the family home and that plaintiff should be awarded the home to better enable her to support herself and the children; that plaintiff did not condone the extreme cruelty inflicted upon her by defendant; that plaintiff did not wrongfully inflict mental pain and suffering upon defendant; that defendant was not a good and faithful husband to plaintiff; and that there was no connivance, collusion or recrimination on the part of plaintiff toward defendant.

On October 23, 1962, the court awarded plaintiff an interlocutory decree of divorce on the ground of extreme mental cruelty and further awarded her custody of the minor children, alimony in the amount of \$1 per year, child support in the amount of \$50 per month for each of the three youngest children, attorney's fees, and the family home together with the immediate and exclusive possession thereof.

On January 24, 1963, plaintiff obtained an order to show cause why defendant should not be excluded from the family dwelling. In her supporting affidavit, plaintiff averred that defendant had continued to remain in and about the family home subsequent to the entry of the interlocutory decree; that defendant had

failed to obtain any type of employment and had paid nothing on account of child support or attorney's fees; that on June 19, 1962, defendant had surreptitiously filed an application for an arrangement with his creditors, all of whom were his close relatives, in federal district court, and had thereby sought and still seeks to place a \$16,000 second deed of trust in favor of these creditors upon the house; that the atmosphere in the house had become intolerable to plaintiff and the children, and there was danger of one or more members of the family being forced into physical violence with defendant; that defendant had created a fire hazard by maintaining piles of newspapers and other records in the basement where he was currently camping; that plaintiff had been compelled to padlock the refrigerator in order to guard the meager necessities of life from defendant; that plaintiff had barely enough funds to support her family due to defendant's failure to contribute any sum toward house payments, taxes, or the support of the children; that unless defendant were to be ousted from the premises, plaintiff and her minor children would be forced to seek other living quarters at a higher rental than she could afford; that if defendant were forced to move from the house, he might be more inclined to seek gainful employment.

Defendant filed an answer, alleging that the superior court lacked jurisdiction over the house by reason of his having initiated proceedings in federal district court to obtain a creditors' arrangement. He also alleged that he was without the necessary funds to secure other living quarters and to move his "extensive library."

On February 15, 1963, after a hearing, the court ordered defendant to remove himself from the family home not later than 8 p.m. on the same day and to remain excluded from said premises until further order of the court.

Turning first to the issues raised by the appeal from the interlocutory decree of divorce, it is appellant's contention that the trial court erred in finding that respondent was acting in good faith when she instituted the present divorce action. Appellant asserts that respondent was suffering from a "psychological disorder" and that her mind was "in the grip of the demon menopause." It suffices to say that the record contains no support for these charges other than appellant's uncorroborated and highly theoretical testimony. The trial court was clearly entitled to accord it little or no weight.

Appellant next contends that the evidence does not support a finding that he wilfully inflicted grievous mental suffering upon respondent. This contention is frivolous and merits no discussion.

Appellant next contends that the trial court erred in awarding respondent a divorce without finding that appellant's acts were "wrongful." Such a finding is implicit in the finding that "defendant has wilfully inflicted upon plaintiff a course of great and grievous mental pain and suffering without any cause or provocation on the part of plaintiff."

Appellant also contends that the court erred in granting a divorce without any corroboration of ex

reme cruelty. It is settled that the principal purpose of the corroboration requirement is to prevent collusion and that where it is clear from the evidence that there is none, only slight additional proof is necessary. *Benam v. Benam* (1960) 178 Cal. App. 2d 837, 842.) Here, the divorce was vigorously contested and the testimony of respondent's witness, Marjorie Mifflin, and of the two minor children, clearly provided sufficient corroboration.

Appellant next contends that respondent had allowed such an unreasonable length of time to elapse between the commencement of appellant's alleged cruelty and the filing of the divorce complaint that connivance, provocation and condonation were established as a matter of law. This position is untenable. Respondent's delay in commencing the present action has no bearing whatever on the question of whether or not she was guilty of provocation. Although an unreasonable delay in bringing suit for divorce does create a presumption of connivance or condonation (Civ. Code, § 125), this presumption is a rebuttable one (Civ. Code, § 126). In the instant case, the uncontradicted evidence established that from 1949 on, the family was able to subsist only by exhausting all of respondent's earnings and by supplementing such income with loans obtained from relatives. Under such circumstances, respondent's delay in commencing the instant proceedings was clearly excusable. (*Washington v. Washington* (1949) 91 Cal. App. 2d 811.)

Appellant also asserts, however, that his own testimony established that in September, 1961, respondent

had expressly agreed to condone his prior conduct in return for his promise to paint the exterior of the house. Appellant overlooks the fact that respondent denied any such agreement and testified only that appellant had undertaken some painting work at that time.

Appellant next contends that the court abused its discretion in finding that there had been no recrimination in bar of the divorce. Here again, appellant relies upon his own unsubstantiated testimony and also upon the fact that respondent's complaint contained an allegation of physical cruelty which she subsequently admitted to be untrue. Upon being questioned in regard to this particular allegation of the complaint, respondent indicated that she was confused as to the distinction between physical and mental suffering. Although she readily admitted that appellant had never actually struck her, she stated that appellant's acts had caused her to undergo such great mental tension as to involve physical pain. Under such circumstances, the court was clearly justified in concluding that respondent's act of signing the complaint did not amount to recrimination. It is settled that a court is not required to deny a divorce merely because both parties are at fault. (*Hendricks v. Hendricks* (1954) 125 Cal. App. 2d 239, 241-242.) Even where both parties demonstrate grounds for divorce, the trial court may award a divorce solely to the party less at fault. (*Santens v. Santens* (1960) 180 Cal. App. 2d 809, 819.)

Appellant's next contention is that the trial court erred in arbitrarily excluding important testimony on

material issues. The record reveals that the trial court allowed appellant great latitude in examining respondent. Contrary to appellant's assertion, the court did permit him to ask numerous questions bearing upon respondent's physical and mental symptoms during menopause and the medical treatment which she received for her condition; also, that he was allowed to question plaintiff about events occurring immediately prior to the filing of this action. Objections were sustained only as to questions which were argumentative or which assumed facts not in evidence. Although the court did sustain an objection to appellant's question whether certain funds had been left jointly to respondent and her mother, the court subsequently reversed its ruling and asked respondent whether she had any state or property of any kind which she had not previously mentioned. Respondent stated that she had none.

Appellant next contends that the court interfered with the presentation of his defense and thereby promoted "extrinsic fraud" by (1) denying appellant a 30-day continuance; (2) denying appellant a statutory stay pending his suit money appeal; (3) exerting pressure against the children's testifying; (4) concluding the trial without admitting further testimony for the defense; and (5) refusing to grant appellant's request to reopen the case.

Again the record shows that there is no merit to appellant's contention that the court abused its discretion either in denying him a continuance or in denying him a stay pending his suit money appeal. What we said on May 17, 1963, in affirming the order deny-

ing appellant suit money, applies equally here. "Appellant's contention that the trial court should have stayed the proceedings until funds became available is merely a further attempt on his part to oppose the proceedings and harass the respondent and this court. We think this appeal borders on the frivolous." (Arnold v. Arnold (1963) 216 A.C.A. 354, 355.)

The various proceedings by appellant in this case clearly demonstrate that he has consistently pursued a course of conduct designed at indefinitely postponing trial of the action. Under such circumstances, appellant is in no position to contend that the trial court abused its discretion in refusing to grant a continuance at a time when the action had already been pending some ten months. It is equally apparent that appellant may not complain of the trial court's refusal to stay the divorce proceedings pending an appeal which was patently meritless and which was characterized by this court as bordering on the frivolous.

Appellant's assertion that the trial court "exerted pressure" against the children's testifying is without merit. The trial judge indicated that he wished he could discourage appellant from calling as witnesses two of his minor children, aged thirteen and sixteen. When appellant indicated that he considered their testimony important to the defense, he was permitted to examine them, which he soon abandoned when the testimony elicited from them was extremely unfavorable to him.

Appellant's contention that the trial court erred in concluding the case without hearing further testimony for the defense and in refusing to reopen the case is

caseless. At the conclusion of the case, appellant stated that the principal witness he wished to call was in Hong Kong and that he was agreeable to submitting the case if he could be assured adequate time in which to present his oral argument. The case was then submitted and appellant proceeded with his oral argument.

In the light of appellant's conduct herein, it is evident that the court correctly denied his motion to reopen the case for the purpose of producing further testimony on "all phases of the case."

Appellant next contends that the court erred in awarding respondent child support without considering the parties' circumstances and, in particular, appellant's inability to pay. It is settled that the amount to be awarded for the care, support and education of a child is within the discretion of the trial court. (Cronk v. Cronk (1962) 210 Cal. App. 2d 683, 691; Bowman v. Bowman (1957) 149 Cal. App. 2d 773, 778.) The award of \$50 per month for each minor child did not constitute an abuse of discretion in view of the fact that appellant was a trained professional holding a doctorate in chemical engineering.

Appellant also asserts that the trial court erred in awarding respondent alimony and attorney's fees because there was no showing of need on her part, and that the court erred in awarding custody of the minor children to respondent because there was no showing of her fitness. Here again, an examination of the record disclosed ample evidence in support of the court's findings in respect thereto.

Appellant also contends that the court erroneously awarded the community property (consisting solely of the family dwelling) to respondent without consideration of appellant's debts. It suffices to say that the record contains no evidence of appellant's debts.

Appellant's final contention on appeal from the interlocutory decree of divorce is that the court lacked jurisdiction *in rem* to make an award of the community property by reason of appellant's having commenced a proceeding in federal court to obtain a creditors' arrangement subsequent to the commencement of the divorce proceeding but prior to entry of the interlocutory decree. This argument is untenable. Appellant concedes that his petition for a creditors' arrangement was not filed in the federal district court until June 19, 1962, some six months after the filing of the divorce action. Pursuant to 11 U.S.C.A., section 714, a court having jurisdiction of such a petition may enjoin or stay proceedings pending in other courts.

Appellant did not apply for any such stay and, to the contrary, wilfully concealed from the federal court the fact that divorce proceedings were pending against him.¹ Under such circumstances, the mere filing of the petition for a creditors' arrangement was not in itself sufficient to divest the trial court of jurisdiction. In *Brazil v. Azevedo* (1916) 32 Cal. App. 364, 366, the court held that the mere pendency of proceedings in bankruptcy did not deprive the superior court of juris-

1. On February 28, 1963, the referee in bankruptcy in the United States District Court for the Northern District of California, Southern Division, ordered the confirmation of arrangement set aside on the ground, among others, that appellant had concealed from that court "all facts of his marriage and divorce in the Superior Court of the State of California . . ."

iction. (To the same effect, see *Smith v. Phlegar* (1951) 236 P. 2d 749, 753-754.)

The interlocutory decree, however, makes a present disposition of the community property. It is now settled that such an award is improper and, where made, should be modified by the appellate court so as to provide that the provisions disposing of the community property of the parties shall be effective upon the entry of the final decree of divorce. (*Brown v. Brown* (1960) 77 Cal. App. 2d 387.)

The sole issue remaining is whether the trial court erred in entering its order of February 15, 1963, directing appellant to remove himself from the family residence not later than 8 p.m. on that day. Here again, appellant asserts that exclusive jurisdiction over the property was vested in the federal court by virtue of the filing of the petition for a creditors' arrangement. We have disposed of this contention.

Appellant also asserts that the court was not entitled to order him from the family home in the absence of a showing that respondent was in danger of suffering actual physical violence at his hands. This argument is untenable. Civil Code, section 157, provides that in actions or proceedings for divorce, the court may make orders for temporary exclusion of either party from the family dwelling or from the dwelling of the other until the final determination of the action. This section sets forth no requirement that the party seeking such an order make a showing of threatened physical violence. (See *Machado v. Machado* (1962) 8 Cal. 2d 501, 507.) In view of the averments of

respondent's affidavit, which we have set forth in detail above, this order clearly did not constitute an abuse of discretion.

For the reasons above stated, the trial court is directed to modify the interlocutory decree of divorce to provide that the provisions disposing of the parties' community property shall be effective upon the entry of the final decree of divorce; the interlocutory decree as so modified, is affirmed; and the order excluding appellant from the family dwelling is affirmed. Respondent to recover her costs herein.

SHOEMAKER, P. J.

WE CONCUR:

AGEE, J.

TAYLOR, J.

CERTIFICATE OF NONPUBLICATION

This opinion does not require publication in the advance sheets or official reports, under the standards provided by Rule 976, California Rules of Court.

SHOEMAKER, P. J.

AGEE, J.

TAYLOR, J.

APPENDIX "B"

HOWARD ARNOLD,	} <i>Appellant,</i>
VS.	
ROBERT L. BOSTICK,	

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Dec. 22, 1964.

Rehearing Denied Feb. 4, 1965.

HAMLIN, Circuit Judge.

J. Howard Arnold, appellant herein, filed an action *propria persona* in the United States District Court for the Northern District of California, Southern Division, seeking damages against Robert L. Bostick, appellee herein, for alleged violation of his civil rights under 42 U.S.C. §§ 1981-83 and §§ 1985-86, inclusive. The complaint and amendment thereto contained *inter alia* the following allegations: That Robert L. Bostick was at all times mentioned therein a duly elected, qualified and acting judge of the Superior Court of the State of California in and for the County of Alameda; that as such judge appellee made an order excluding appellant from the family dwelling until further order of the court; that thereafter appellee issued an order to show cause in re contempt directed at appellant for violation of such order, and following

a contempt hearing found appellant to be in contempt of court; that appellee imposed on appellant a sentence of five days in the Alameda County jail and a fine of \$100 or twenty additional days in jail; that in accordance with said sentence appellant was imprisoned in the Alameda County jail for twenty-five days; and that up to the time of the filing of the complaint appellant had not regained possession of his family home.

Appellee filed a motion in the United States District Court "to dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted."

[1] Both Appellant and appellee filed in the district court memoranda of points and authorities and attached to appellant's memorandum was an excerpt from the decision of the District Court of Appeal of the State of California, First Appellate District, Division Two, in the case of Frances Kelly Arnold v. J. Howard Arnold, which decision was filed February 14, 1964. From the documents on file it appears that the contempt order complained of by appellant was made in a divorce action filed by Frances Kelly Arnold against appellant in the Superior Court. It further appears that in said action the family home of Mrs. and Mrs. Arnold was found to be community property and was awarded to Mrs. Arnold, together with an interlocutory decree of divorce against appellant. A contention of appellant in the divorce action and in this case was that the Superior Court lacked jurisdiction

make an award of the community property to appellant's wife. On appeal to the District Court of appeal, the judgment of the Superior Court awarding an interlocutory decree of divorce to appellant's wife and awarding to her the real property of the parties was affirmed. Concerning appellant's claim of lack of jurisdiction the District Court of Appeal stated:

"Appellant's final contention on appeal from the interlocutory decree of divorce is that the court lacked jurisdiction *in rem* to make an award of the community property by reason of appellant's having commenced a proceeding in federal court to obtain a creditors' arrangement subsequent to the commencement of the divorce proceeding but prior to entry of the interlocutory decree. This argument is untenable. Appellant concedes that his petition for a creditors' arrangement was not filed in the federal district court until June 19, 1962, some six months after the filing of the divorce action. Pursuant to 11 U.S.C.A., section 714, a court having jurisdiction of such a petition may enjoin or stay proceedings pending in other courts. Appellant did not apply for any such stay and, to the contrary, wilfully concealed from the federal court the fact that divorce proceedings were pending against him. Under such circumstances, the mere filing of the petition for a creditors' arrangement was not in itself sufficient to divest the trial court of jurisdiction. In *Brazil v. Azevedo* (1916) 32 Cal. App. 364, 366, [162 P. 1049], the court held that the mere pendency of proceedings in

bankruptcy did not deprive the superior court of jurisdiction. (To the same effect, see *Smith v. Phlegar* (1951) [73 Ariz. 11] 236 P.2d 748, 753-754.)”

We agree.

As stated in *Barr v. Matteo*, 360 U.S. 564 at 569, 79 S.Ct. 1335 at 1338, 3 L. Ed.2d 1434,

“This Court early held that judges of courts of superior or general authority are absolutely privileged as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those acts are alleged to have been performed, *Bradley v. Fisher*, 13 Wall 335 [2 L.Ed. 646] * * *.”

[2] We hold that the above doctrine of judicial immunity effectively precludes any recovery by appellant in his action for damages filed in the district court and that the order of the district court dismissing the action was proper.

Judgment affirmed.

FEB 14 1937

No. 20617

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. HOWARD ARNOLD

APPELLANT

vs.

WILLIAM J. MCGUINNESS

APPELLEE

APPELLANT'S CLOSING BRIEF

Appeal from the
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

FILED

JUN 22 1936

WM. B. LUCK, CLERK

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APPELLANT, pro se

No. 20617

UNITED STATES COURT OF APPEALS
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APPELLANT, pro se

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FACTUAL BACKGROUND

Under the heading 'FACTS OF THE CASE' and throughout Appellee's Brief, a number of non-facts and semi-facts are presented in a way tending to disparage Appellant's effort to maintain the integrity of his name and to compel the Superior Court in Alameda County to administer justice according to law. A factual reorientation is needed.

Appellant has appeared in his own behalf throughout this litigation by order of the Superior Court which, in defiance of California and Federal law, forced him to trial pro se in the divorce action while permitting his wife to pay counsel from community funds. Appellant's wife is mentally ill from medically untreated menopause in addition to psychotoxic amphetamine 'pep-pills', and incompetent to sue. She is not a 'former wife' (p.3, lines 1, 21), holding only a fraudulent and void Final Decree purporting to vest title to community real property in her for her attorney's financial benefit, which argument the Superior Court and appellate courts refuse to vacate.

Appellant has never claimed that "at the moment he files his petition for the Creditors' Arrangement the Superior Court was automatically' divested of all jurisdiction" (Appellee's Brief, p. 2, line 21), but only that it would have been thus divested of jurisdiction in rem over community property -- which it never held -- by interposition of the paramount Federal court jurisdiction conferred by the Bankruptcy Act. This Court, while following the District Court of appeal decision affirming Judge Bostick's jurisdiction in rem to evict Appellant from his debtor's estate, or a quasi in rem order, twice has refused to decide the weightier jurisdictional question of Superior Court jurisdiction in rem for transferring title to a debtor's estate. Appellant does not question Superior Court jurisdiction in personam

the divorce action proper because of the Federal proceeding.

Appellant did not "refuse to leave the family dwelling" (p.3, e 4), but for reasons of illness and lack of funds was unable to leave out, and by Federal law was legally incapable of surrendering a debtor's estate except on order of the U.S. District Court. His wife is not "compelled to seek redress" (p.3, line 22) for any "refusal to obey" Superior Court orders, "assuming that the Appellant refused to pay the child support and/or alimony" (p. 12, line 25). Appellant never refused to obey a valid order of court. All four contempt actions were brought as abuse of process, to compel him to end his sentence and give up his debtor's estate.

The contempt action from which this damage suit arises began with invalid service of process on July 15, 1964, on which date occurred the hearing on Appellant's motion to vacate the void Final decree of divorce. The contempt proceeding beginning Oct. 8, 1965, was triggered by filing of Appellant's Opening Brief in his second appeal to this Court over confirmation of the Creditors' Arrangement, on Sept. 24, 1965. In neither instance was any money owing to Mrs. Arnold; the purpose of the contempt proceedings was aggressive and punitive, not to compel obedience to prior orders but to quiet title and prevent further litigation. As noted in the Complaint (Paragraph 7; Clerk's Transcript, p. 2), a conspiracy involving Appellee exists and utilizes void judgments and contempt orders to defeat justice for the mercenary advantage of Appellant's wife and her attorney and the defrauding of Appellant and his creditors.

It is an open secret, of which this Court should take judicial notice, that divorce-court judges commonly misuse their powers to award and enforce unmerited divorces for the purpose of enriching

divorce lawyers generally, especially in cases involving substantial community assets. The injustice of the situation is a national scandal, especially in California and most especially in Alameda County. The unprecedented decisions in Arnold v. Arnold and their (unpublished) affirmance on appeal constitute an incredible perversion of judicial power, redress for some of which is sought herein.

SUMMARY OF ARGUMENT

A contempt proceeding is separate from the divorce action, and must be begun by service of process anew. Appellate affirmation of jurisdiction in rem over community property is irrelevant. A Motion to Quash service of an order to show cause is proper at defendant's option, to test the court's jurisdiction of his person separately from the main contempt hearing. Where the affidavit fails to allege and provide factual support for each necessary element of a contempt, the court's jurisdiction of the subject-matter is not invoked, but is clearly and entirely absent for the particular case. Issuance of an Order to Show Cause based on such defective affidavit is a void (not erroneous) act for which judicial immunity is absent, the defect in the affidavit precluding a valid exercise of judicial discretion. Only by actually having jurisdiction, not merely presuming that he has it, can a judge avoid liability from damages for his judicial acts. For his illegal ministerial acts, such as commitment of Appellant to jail, he enjoys no immunity. Superior Court jurisdiction of the subject-matter and of the person was never established in the particular case and all of Appellee's judicial acts therein were wholly void, not erroneous, all jurisdiction being clearly absent because of Appellee's disregard of the affidavit's defect and of the quashing statute.

The above information was obtained from a review of the records of the Department of Health and Human Services, Office of the Assistant Secretary for Health Policy and Statistics, Division of Health Care Statistics, Bureau of Health Data Administration, Office of the Chief Medical Officer, and the Office of the Assistant Secretary for Health Policy and Statistics, Division of Health Care Statistics, Bureau of Health Data Administration, Office of the Chief Medical Officer.

The first of these is the fact that the
 Government has not yet decided whether
 it will accept the offer of the
 Government of the United States to
 purchase the rights in the
 invention. The second is the fact
 that the Government has not yet
 decided whether it will accept the
 offer of the Government of the
 United States to purchase the
 rights in the invention. The third
 is the fact that the Government
 has not yet decided whether it
 will accept the offer of the
 Government of the United States
 to purchase the rights in the
 invention.

ARGUMENT

I

jurisdiction of defendant's person established in a divorce action does not continue into a contempt proceeding, which is a separate action.

Service of process on Appellant in November, 1961, gave the Superior Court a jurisdiction of his person which continues to the present time -- but for the divorce action proper, and not for the contempt proceedings arising therefrom. It is well established that "Contempt proceedings are separate and distinct and no part of the original case out of which they arise."

Bank of America v. Carr (1956) 138 Cal. App. 2nd 727

Being separate, a contempt proceeding must be initiated by service of process; a notice of motion is not sufficient.

Lund v. Sup. Ct. (1964) 61 Cal. 2nd 698

Contempt proceedings being criminal in nature,

Uhler v. Sup. Ct. (1953) 117 Cal. App. 2nd 147

When minimal procedural safeguards are observed (though trial by jury is denied), no inferences may be made against the defendant, and the affidavit constituting the complaint must allege with particularity the necessary elements of a contempt, or the process is void.

Warner v. Sup. Ct. (1954) 126 Cal. App. 2nd 821

Ny, In re (1962) 201 Cal. App. 2nd 728

Section 1211, Code of Civil Procedure

The Order to Show Cause served on Appellant July 15, 1964, was void because the supporting affidavit was defective, and gave the court no jurisdiction of Appellant's person for the contempt proceeding, despite continuing jurisdiction in personam for the divorce action proper.

jurisdiction in personam for the contempt proceeding is wholly unrelated to jurisdiction in rem for quasi-in-rem eviction, and has not been affirmed by any appellate court in Arnold v. Arnold.

The only jurisdictional question raised and decided in Arnold v. Arnold and Arnold v. Bostick (Appellee's Brief, Appendices A and B) is that of Superior Court jurisdiction in rem to issue a quasi-in-rem eviction order removing Appellant from his debtor's estate in defiance of the paramount and exclusive jurisdiction in rem conferred by Congress upon the U.S. District Court as a court of bankruptcy. There was no question of State-Federal conflict of jurisdiction in personam, which may be exercised concurrently by both courts in the divorce action and the Arrangement proceeding. The District Court of Appeals, adopted by this Court, decided (erroneously, and without authority of support in law or prior court decisions) that the Superior Court took and held an indivestible jurisdiction in rem over community property; jurisdiction in personam was not mentioned.

Appellee's Brief presumes that there is but a single jurisdiction involved, which continues from divorce action to contempt proceeding (pp. 4-9), when in fact there are 5 separate jurisdictions:

- (1) Jurisdiction in personam for the divorce action
- (2) Jurisdiction in personam for the contempt proceeding
- (3) Jurisdiction in rem over the community property
- (4) Jurisdiction of the subject-matter of divorce
- (5) Jurisdiction of the subject-matter of contempt.

Jurisdiction in personam is secured by service of process, jurisdiction in rem by seizure of property, and jurisdiction of the

subject-matter by statutory enactment and constitutional authorization. Obviously, no once-for-all-time determination can suffice to establish types of jurisdiction in 3 separate cases; each must be considered separately, in the light of existing circumstances. An appellate court decision of Feb. 14, 1964, in a divorce action could not predetermine that the trial court on July 15, 1964, would secure a jurisdiction of a different type in a separate proceeding. Superior Court jurisdiction of person and subject-matter in the divorce action is unchallenged; its jurisdiction in rem was affirmed on appeal; its jurisdiction of person and subject-matter in the contempt proceeding is denied by Appellant and has had no consideration on appeal.

III

A Motion to Quash is proper at the start of a contempt proceeding, to test the court's jurisdiction of the defendant's person.

Appellee's Brief (pp. 8-9) contends that the quashing statute, Sec. 416.1, Code of Civil Procedure, could not be used in the contempt proceeding for two reasons: (1) The contempt proceeding was not a new action, but a part of the divorce suit; (2) The issue of "jurisdiction" had been settled in the appeal of the eviction order, the Superior Court holding a continuing "jurisdiction" to enforce its orders, and an uninterrupted "jurisdiction over both parties". It is evident that these concepts conflict with settled California law: the contempt proceeding is separate, and a newly established personal jurisdiction is needed. Appellant had a legal right to invoke the quashing statute, although the jurisdictional insufficiency of the affidavit could be reached by demurrer in a general appearance. That the Order to Show Cause set a date certain for the hearing (Appellee's Brief, p. 11, line 23; p. 12,

ne 17) in no way obligated Appellant to make a general appearance at that time and refrain from using the Motion to Quash.

It is not true that "Appellant seeks to resist valid orders" Appellee's Brief, p. 7, line 4) or "to obstruct the lawful process of the Superior Court" (p. 13, line 27) in utilizing the quashing statute. He seeks only a modicum of success in a desperate rear-guard action of defense against a divorce court armed with void orders and misused contempt powers, determined to destroy his home and family for mercenary reasons entirely outside the law. Appellee's intent, as clearly demonstrated after the 1964 and 1965 illegal arrests of Appellant, was to hold the hearing as scheduled, quickly deny the motion to quash, ignore the statutory 10- or 15-day continuance, and proceed immediately to the main contempt hearing.

Such denial of due process could not be challenged at the appellate level as suggested (Appellee's Brief p. 6, line 4), and as is theoretically possible. An attorney found in contempt is given a stay to permit carrying the case to the highest appellate level, if he so desires; a pro se litigant -- particularly a husband contesting a divorce action -- is sentenced to jail "forthwith", and stay is denied. Stays were thus denied by Judge Bostick in 1963 (25-day term) and by Judge McGuinness in 1964 (3-day term). Moreover, relief by habeas corpus was denied by Judge Sweigert, and by this Court in Arnold v. Bostick. It appears likely that all remedies are unavailable in practice.

Likewise, the suggestion that modification of an order is a useful method of securing relief (p. 7, line 7) is unacceptable. Appellant's defense is that no money is owing under the order, even if he were able to pay. Had the divorce court been willing to do justice, it would have refrained from awarding a groundless divorce to his

1. The first of these is the fact that the
2. second of these is the fact that the
3. third of these is the fact that the
4. fourth of these is the fact that the
5. fifth of these is the fact that the

mentally ill wife, evicting him illegally from his home, giving her custody of four minor children, refusing to vacate a void Final Decree of divorce fraudulently obtained, and denying rights of creditors. Since the purpose of these contempt actions is not to enforce valid orders, but to end litigation and consummate the plundering of Appellant's debtor's estate, it is evident that modification of orders is ineffective as a means of avoiding contempt proceedings.

IV

Sufficiency of the affidavit on which an Order to Show Cause is based should be determined early -- before issuance of the Order, or on motion to Quash -- not at the main contempt hearing.

The suggestion that a judge's refusal to issue an Order to Show Cause would be "a serious breach of ethical conduct at the very least" (Appellee's Brief, p. 13, line 5) must be rejected as the opposite of the truth. The Order is more than a Notice of Hearing; it is the means of initiating a criminal prosecution, and should not be issued casually or without searching judicial scrutiny of the affidavit, whose sufficiency is a jurisdictional prerequisite to the Order. Appellee did not act "in the manner which the law demanded of him" (p. 13, line 17), but based his Order on an affidavit which failed to charge a contempt. The Order was therefore void.

"...no warrant could legally be issued upon the complaint made against the appellant. . . She was charged with the commission of an act which did not constitute a crime, and therefore the (magistrate) never acquired any jurisdiction to proceed in the matter, and the judgment and commitment are void on their faces."

DeCoursey v. Cox (1892) 94 Cal. 665

e affidavit must state facts showing the court's jurisdiction.

Neves v. Costa (1907) 5 Cal. App. 111

the complaint is insufficient, charging no offense, the order issued void, and the judge issuing it is liable for damages.

Kuhn v. McNeal (1931) 41 Ohio App. 485, 181 NE 153

Kaptur v. Kaptur (1934) 50 Ohio App. 91, 197 NE 496

Steele v. Rauchfuss (1916) 157 NY Supp. 103

judge is liable for damages resulting from a contempt proceeding he lacks jurisdiction in the main action from which it arose.

Manning v. Ketcham (1932) 58 Fed. 2nd 948 (CA, 6th)

Harkness v. Hyde (1918) 31 Idaho 784, 176 Pac. 885

Holz v. Rediske (1903) 116 Wis. 353, 92 NW 1105

Jones v. Grooms (1937) 56 Ohio App. 351, 10 NE 2nd 958

the case at bar, arising from a contempt proceeding within a larger contempt proceeding, the importance of the affidavit on which the latter depends for its validity is evident. It would have been to appellee's advantage to encourage a prior hearing on the motion to dismiss instead of discouraging it and ordering a void interim commitment to jail for non-attendance at an illegal hearing.

V

appellee's act was not his erroneous believing he had jurisdiction, but his void exercise of a jurisdiction he did not possess.

It cannot be maintained that Appellee's sole overt act "for which erroneous act there is no civil liability" (Appellee's Brief, p. 11, line 5) was incorrectly believing he had jurisdiction to proceed when in fact he did not. Error in the exercise of an existing jurisdiction is excusable; error in assuming a non-existent jurisdiction is not.

"Respondent . . . apparently claims that where the judge assumes jurisdiction or has determined to exercise it, there can be no liability, for the reason that his judgment is but erroneous. But the court cannot confer jurisdiction by merely assuming it; nor can its determination that it has jurisdiction confer it. Where the judge has in fact no jurisdiction to act, his order of arrest is void; and whether he has jurisdiction must be determined from the affidavit itself and not from what the judge thinks it authorizes him to do."

Fukumoto v. Marsh (1909) 130 Cal. 66

In short, the only way to avoid liability is to have jurisdiction. The distinction between void and erroneous judgments is elucidated by the Supreme Court of California, quoting an earlier decision:

"When the proof has a legal tendency to make out a proper case, in all its parts, for issuing the process, the process will be valid until it is set aside by a direct proceeding for that purpose. In one case (the reference here is to a case where there is a total defect of evidence as to any essential fact) the Court acts without authority; in the other it only errs in judgment upon a question properly before it for adjudication. In one case there is a defect of jurisdiction; in the other, there is only an error of judgment. Want of jurisdiction makes the act void; but a mistake concerning the just weight and importance of evidence only makes the act erroneous."

Dusy v. Helm (1881) 59 Cal. 188

An insufficient affidavit for a valid Order to Show Cause must contain conclusive facts for each of the four necessary elements of a contempt. If facts are given for one element, the affidavit is insufficient,

d obviously so; no valid order can be based on it, and the judge
o issues the necessarily void order is liable for damages caused.
some facts are given for each necessary element of contempt, the
dge may make a judicial determination of their adequacy; if he con-
udes, erroneously, that the affidavit is sufficient, and issues the
der, he does so with immunity from liability. As one leading case
presses the rule,

"Where the judge is called upon by the facts before him to decide
whether his authority extends over the matter, such an act is a
judicial act, and such officer is not liable in a suit to the person
affected by his decision, whether such decision be right or wrong
But when no facts are present, or only such facts as have neither
legal value nor color of legal value in the affair, then, in that
event, for the magistrate to take jurisdiction is not, in any mann-
er, the performance of a judicial act, but simply the commission
of an unofficial wrong."

Grove v. Van Duyn (1882) 44 N.J.Law 654, 42 Am. Rep. 648
Decisive importance also attaches to the question whether the judge
a jurisdiction in the particular case and went beyond his authority,
r simply acted when that authority had not been legally invoked.

"A distinction must be here observed between excess of juris-
diction and the clear absence of all jurisdiction over the subject-
matter. When there is clearly no jurisdiction over the subject-
matter, any authority exercised is a usurped authority, and for the
exercise of such authority, when the want of jurisdiction is known
o the judge, no excuse is permissible."

Bradley v. Fisher (1871) 80 U.S. 335 at 351
This language appears in the opinion of this Court in the case of

ted in Appellee's Brief, p. 10, and Appellant's Opening Brief, p. 5. Applied to the case at bar, it means that Appellee knew, from the presence of all facts concerning one necessary element of contempt (Appellant's ability to comply with the support order) his jurisdiction over the subject-matter of contempt had not been invoked, his Order to Show Cause was void, he had no authority over the main contempt matter and no jurisdiction of Appellant's person. He should have rejected the wife's affidavit as insufficient, refused to issue the Order to Show Cause, and, of course, proceeded no further in the matter. Filing of the Motion to Quash alerted him to the deficiency of the affidavit; Appellant's argument --repeated three times-- at the hearing was known to Appellee that he was proceeding illegally in the clear absence of all jurisdiction of subject-matter AND person. Imposition of these circumstances of a harsh and unreasonable 3-day jail sentence, and its execution 'forthwith' to prevent collateral attack, were excusable misuses of judicial power which should be redressed.

VI

Legal acts, specifically forbidden by statute, carry no immunity.

Appellee's refusal to honor the provisions of the quashing statute makes his judgment of contempt against Appellant not only void for lack of jurisdiction but also illegal, for the statute requires that "... the time of the moving party to plead to the complaint shall be extended, and no default may be entered against him, ..."

Section 416.1, Code of Civil Procedure

When the time to plead is extended, the hearing must be postponed beyond the date originally set by the Order to Show Cause, and non-

pearance by the defendant on the original hearing date cannot be default and should not be punishable as a contempt of court.

"The term 'default' is defined as the failure to perform a duty or an obligation required by law or by contract."

Lindley v. Sale (1934) 140 Cal. App. 662

default was entered against Appellant, despite statutory prohibition, when he was adjudged in contempt for not attending the hearing originally scheduled by the Order to Show Cause.

"Although a court may have jurisdiction over the parties and the subject-matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void."

United States v. Walker (1883) 109 U.S. 258 at 266

Without jurisdiction, the judge's liability for unlawful acts is necessarily no less, despite contentions of judicial privilege.

"A quasi-judicial officer... acting outside scope of his jurisdiction and without authorization of law, cannot shelter himself from liability to private citizen under Civil Rights Act by plea that he was acting under color of office."

Lewis v. Brautigam (1955) 227 Fed. 2nd 124 (CA, 5th)

This Court has expressed agreement,

"This is not a case in which Henson can claim immunity from responsibility by reason of his office of magistrate. He never acquired jurisdiction of the person of the plaintiff or the authorization to hold him in jail. Instead of obeying the plain provisions of the law, he pursued a course wholly different in nature. When he does this, he steps over the boundary of his judicial authority, and is as much out of the protection of the law in respect to the

particular act, as if he held no office at all."

Von Arx v. Shafer (1917) 241 Fed. 649 (CA, 9th)

and the U.S. Supreme Court also favors redress of unlawful acts:

"The acts of all its officers must be justified by some law, and if an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief. . to a party aggrieved by any action. . which is unauthorized by the statute under which he assumes to act. . . Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public. . . officer, whose action is unauthorized by any law and is in violation of the rights of the individual."

American School v. McAnnulty (1902) 187 U.S. 94 at 108

VII

Ministerial acts of Appellee are also involved, and unlike erroneous judicial acts carry no immunity from liability for damages.

Appellee's Brief limits itself to consideration of allegedly erroneous judicial action' against Appellant (p. 13, line 22), ignoring ministerial acts for which there is no immunity (Reporter's Transcript, at p. 7 of Clerk's Transcript; Appellant's Opening Brief, pp. 3, 4). Appellee's acts of issuing the Order to Show Cause and rendering the judgment of contempt were judicial, and void; his acts of issuing the bench warrant and the commitment to jail were ministerial, and wrongful because they violated the plain injunction of the quashing statute. It was not the Order to Show Cause or even the judgment of contempt that injured and damaged Appellant, and not the bench warrant; it was the commitment to jail, an unauthorized ministerial act for which no judicial immunity can be claimed, even by a judge.

"A 'ministerial officer' is distinguished from a 'judicial officer' as respects liability in a civil action for acts done in an official capacity, in that a 'ministerial officer' has a line of conduct marked out for him and must follow it and may be held liable for any failure to do so which results in an injury to another, while a 'judicial officer' has powers confided to him to be exercised according to his discretion and does not act in his official capacity at his peril."

Davis v. Burris (1938) 51 Ariz. 220, 75 Pac. 2nd 689

"In absence of statutory authority, governmental officer acts at his peril and is personally liable for wrongs. . . Unless justified by some constitutional statute, a governmental officer or employee acts at his peril and personally pays for his wrongs -- a salutary principle necessary to discourage abuse of power, that official power which the great Marshall declared would be abused wherever authority was reposed."

Scheer v. Moody (1931) 48 Fed. 2nd 327 at 330 (DC, Mont.)

Ministerial acts do not require the exercise of judicial discretion, but nevertheless call for careful attention to their legality and correctness.

"A ministerial act may, perhaps, be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done. . . And the act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act. . . ."

Flournoy v. Jeffersonville (1861) 17. Ind. 169, 79 Am. Dec. 468

e ministerial officer is obligated to determine whether the act to performed is legal and proper; if it is not, he is liable.

"In the trial and decision of the issue whether or not Brown was guilty . . and the imposition of the sentence rendered, the justice exercised his judicial powers. That judgment was within his jurisdiction and lawful. When he had rendered it, the exercise of those powers in that case ceased. . . His issue of the commitment which he signed was a mere clerical or ministerial act. In its issue he exercised none of the powers of a judge. . . no statute . . gave this justice any authority to issue this commitment. . . . the justice. . could not escape liability for the damages which the plaintiff has suffered from his unlawful act."

Weigel v. Brown (1912) 194 Fed. 652 (CA, 8th)

".. when . . a final judgment has been rendered, there can remain no further judicial duty to be performed. The court or magistrate has then no longer a question upon which to deliberate. . Nothing is left to be done but to carry the judgment into effect. That, under our law, is accomplished by means of an execution. . . the issuing of such an execution . . was merely a ministerial act, and in a particular instance, where such process was issued erroneously, the magistrate was held responsible in damages for the commitment to prison of a party under it. . knowing at the time that the statute absolutely prohibited the imprisonment. . ."

Sullivan v. Jones (1854) 2 Gray (68 Mass.) 570

Wyatt v. Baker (1930) 41 Ga.App. 750, 154 SE 816

pellee's issuance of a commitment after filing of the Motion to wash had suspended his right to do so finds an analogy in

Banistes v. Wakeman (1891) 64 Vt. 203, 23 Atl. 585, 15 LRA 201

re a mittimus issued after an appeal was taken, interrupting the jurisdiction of the trial court.

VIII

ents subsequent to filing of Complaint herein are relevant to re-
at by Appellant for leave to amend, if dismissal be affirmed.

the Opening Brief (p. 14, 15) Appellant outlined additional void acts Appellee occurring subsequently to the Complaint and therefore not contained in the record on appeal. The purpose of this recital was supply a basis for his request for this Court's leave to amend Complaint, in the event dismissal were affirmed, and not to add extraneous argument against dismissal. The purpose of such a request to consolidate two actions into one and thereby expedite justice,

Mitchell v. RFC-RI Corp. (1956) 148 F.Supp. 245 (DC, Mass.)

Griffin v. Locke (1961) 286 Fed. 2nd 514 (CA, 9th)

tr dismissal without leave to amend, the District Court cannot now at leave while the appeal is pending,

Ginsburg v. Stern (1957) 242 Fed. 2nd 379 (CA, 3rd)

Sidis v. F-R Publ. Co. (1943) 7 F.R. Serv. 15a24, Case 2 (DC, NY.)

ss the mandate of this Court expressly permits, amendment can be made subsequent to affirmance of the dismissal.

DixiCola v. Coca Cola (1944) 146 Fed. 2nd 43 (CA, 4th)

Porter v. Block (1946) 156 Fed. 2nd 264 (CA, 4th)

Food Handlers v. Plus Poultry (1958) 23 F.R.D. 109 (DC, Ark.)

though Appellant believes dismissal erroneous and trusts that the District Court decision will be reversed on appeal, he nevertheless requests that leave to amend be granted if the decision of this Court should be adverse, in order to anticipate that contingency.

CONCLUSION

ar absence of all jurisdiction of the subject-matter resulted from
efficiency of the affidavit on which Appellee based his Order to
w Cause, which was therefore void (not erroneous) and incapable
securing jurisdiction of Appellant's person. Appellee, aware of the
essity of showing ability to comply as an element of contempt,
w that the jurisdiction of his court over the subject-matter had
been invoked and was entirely absent. Appellee's bench warrant
l judgment of contempt were likewise void, not erroneous. Appellee's
nmitment of Appellant to jail was an illegal ministerial act which
ries no judicial immunity. Such immunity being wholly lacking,
ief can be granted under the Civil Rights Act. District Court
nissal of the complaint was unjustified, and should be reversed.

ed: June 17, 1966.

Respectfully submitted,

J. Howard Arnold
Appellant, pro se

CERTIFICATE

certify that, in connection with the preparation of
is brief, I have examined Rules 18 and 19 of the
nted States Court of Appeals for the Ninth Circuit, and
a, in my opinion, the foregoing brief is in full
ompliance with those rules.

J. Howard Arnold
Appellant, pro se

FEB 14 1966

No. 20617

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. HOWARD ARNOLD

APPELLANT

vs.

WILLIAM J. McGUINNESS

APPELLEE

FILED

12 1966

WM. B. LUCK, CLERK

PETITION FOR REHEARING

FILED

SEP 12 1966

WM. B. LUCK, CLERK

Appeal from the
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

J. HOWARD ARNOLD
Postoffice Box 919
Berkeley 1, California
Telephone LA 4-8473
Appellant, pro se

No. 20617

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vs.

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APPELLEE

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e Honorable HARVEY M. JOHNSON,
JAMES R. BREWSTER,
BEN CUSHING LUNTWAY,

s of the United States Court of Appeals for the Ninth Circuit:

This Petition for Rehearing is respectfully presented to
the Court's attention to certain controlling matters of fact and
which appear to have been overlooked in the course of rendering
decision of August 12, 1966, in this case.

I

order affirming the District Court's dismissal under Rule 12(b)(6)
accompanied by no opinion of the Court stating its reasons for the
decision, but simply stated that

"After a careful consideration of the record and of the
arguments made by and on behalf of the parties, we con-
clude that the judgment herein must be, and is hereby,
affirmed."

case, the District Court order gave no reason for the dismissal,
and, as Judge Koelsch has remarked, it should always do so.

Griffin v. Locke (1961) 286 Fed. 2nd 514 (CA, 9th)

Court, in turn, should not neglect to state its reasons for affirm-
ing, however briefly --especially where the District Court gave none,
no clear basis for affirmation is to be found in Appellee's Brief.
Plaintiff's opening and closing briefs showed plainly that the Superior
Court had never taken any jurisdiction of the contempt proceeding, in
fact or of the subject-matter, making Appellee's decisions as a
result wholly void and carrying no immunity from civil suit for damage.
Appellee's Brief presented jurisdictional arguments entirely at variance
with established law, sought to show that Appellee had "some" jurisdic-

THE HISTORY OF THE
CITY OF NEW YORK
FROM 1624 TO 1898

THE HISTORY OF THE CITY OF NEW YORK FROM 1624 TO 1898. BY JOHN E. BOWEN. NEW YORK: THE NEW YORK PUBLIC LIBRARY, ASTOR LENOX AND TILDEN FOUNDATIONS. 1899.

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which conferred full judicial immunity for acts that were merely
neous and not void, and attempted to rely on a wholly irrelevant
fiction in rem over property derived from a previous case. The
Court has overlooked an opportunity -- and a duty -- to clarify the case
giving specific reasons for its decision.

II

of this Court to file a supplementary pleading concerning acts of
the defendant subsequent to filing of the District Court action was requested
by Appellant, in his Opening Brief (p. 15), his Closing Brief (p. 17), and
his oral argument. Since filing of this damage suit clearly disqualified
the defendant from taking any further part in Appellant's divorce case, no
question of his liability for damages from his acts in 1965 can exist.
The sole question before the Court is whether Appellant is to be per-
mitted to include the later cause of action in the pending suit, or
required to file a new suit in District Court. Since justice requires that
a supplemental pleading be granted, it is presumed that
in making its order this Court overlooked the matter of granting such
an order and will issue a further order.

III

This Court is well aware, its order of affirmation grants relief to
no other judge, and for that reason alone should be accompanied by
a detailed opinion justifying the decision as a matter of law. The public
should not be left in a position to say, in criticism of this Court, as
Justice Carter has said of the California Supreme Court,
"The majority of this court is apparently determined that no action
for false arrest, false imprisonment, or malicious prosecution shall

lie against anyone connected with the enforcement of the law."

Coverston v. Davies (1952) 38 Cal. 2nd 315 at 324

"The majority holding in the present case affirming a judgment of dismissal following an order sustaining defendant's demurrer to plaintiff's complaint without leave to amend, adds another case to the growing list of those recently decided by this court which have arbitrarily deprived a plaintiff of his right to a trial on the merits. . . While it may be admitted that (false imprisonment) is a disfavored action, the policy should not be pressed further to the extreme of practical nullification of the tort, and the consequent defeat of the other important policy which underlies it, of protecting the individual from the injury caused by unjustified criminal prosecution. . The plaintiff here should have been permitted to prove, if he could, that defendant was not acting within the scope of his authority and therefore not entitled to the privilege of immunity. . . Plaintiff has, in effect, been denied his day in court as the result of this holding. . . surely the individual citizen is entitled to some protection and should be reimbursed or compensated for injury done to him without right and with malice."

White v. Towers (1951) 37 Cal. 2nd 727 at 734

court, in withholding its opinion, has overlooked an opportunity to give with a few words any possible public opinion that it is acting arbitrarily in a manner that has no support in jurisdictional law, and is not justified because it could not be.

IV

Plaintiff is doubly disadvantaged by opposing a judge and by appearing without counsel. Since the Court is composed of judges who are

members of the bar looking with inherent disfavor on appearances
without counsel, it is doubly desirable that the order affirming dismissal
be accompanied by detailed reasons in support of it, as a matter of
maintaining public confidence in the fairness of judicial decisions. If an
affirmative decision were clearly justified by the facts and the law in this
case, an opinion could be dispensed with; but such is not the situation.
The Court's reasons for affirmation are not apparent, and certainly are
not to be found in Appellee's Brief; they should be stated explicitly.

V

In the absence of the Court's opinion, it must be presumed that the
contentions of Appellee were accepted as a proper basis for affirmation.
However, in this case Appellee's Brief is composed of bad law and in-
correct suppositions throughout, and should not be dignified as accept-
able argument. The Brief's contentions that (1) Jurisdiction continues
in the main action into a contempt proceeding, (2) The quashing
of the writ, Sec. 416.1, Code of Civil Procedure, was improperly used by
Appellant, (3) A judge's belief that he has jurisdiction is sufficient to
confer full immunity, and (4) This Court may not consider any facts
outside the record, even in connection with supplemental pleadings, are
untenable and cannot supply a basis for decision adverse to Appellant.
The speculations of Appellee's Brief that (A) Appellant "seeks to strip
Sameda County Superior Court of jurisdiction", (B) he ignores
all possible remedies in favor of a damage suit against a judge,
(C) he seeks to resist valid orders of the Superior Court, (D) he seeks
refuge from support of his contentions, (E) he should have made a general
affirmance instead of moving to quash the order to show cause, and
(F) he should have appeared for a hearing which could not legally be

are all erroneous and tend to cast aspersions upon Appellant
fiably. Since Appellee's Brief cannot afford a creditable basis for
cision, the Court should supply its own authoritative opinion. The
interpretations of jurisdictional law and the quashing statute con-
in that Brief should not be endorsed, even by implication.

CONCLUSION

For the reasons above stated, Appellant believes a rehearing
be granted and the decision of this Court reversed; but, even if
cision is not reversed on rehearing, a detailed opinion should
e the order of affirmation, and leave to make a supplemental
g should be granted.

I certify that this Petition for Rehearing is presented in
with, that it is not interposed for any purpose of delay, and that
judgment it is well founded and merits favorable consideration.

Respectfully submitted,

: September 11, 1966.

J. Howard Arnold
Appellant

1917-1918

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 14 1967

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SAM MELNICK,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

DEC 1 1965

FRANK

GLADYS TOWLES ROOT
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAM MELNICK,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for violation of Section 371, Title 18, U.S.C., and from the several orders denying Appellant's motion for motion to dismiss (Transcript Vol A, Page 70), judgment and sentence (Transcript Vol 9, Page 1147) and for withdrawal of plea of guilty (Transcript Vol 10, Page 1157).

Appellant was indicted by a Grand Jury in the Southern District of California, Central Division on twenty counts for alleged violation of Section 1343, Title 18, U.S.C.



(fraud by wire); Section 2314, Title 18, U.S.C. (inter-state transportation of money taken by fraud); Section 2, Title 18, U.S.C. (aiding and abetting); and Section 371, Title 18, U.S.C. (conspiracy); jurisdiction of the District Court rests upon Section 3231, Title 18, U.S.C. Judgment of conviction was rendered June 28, 1965 (Transcript Vol 9, Page 1147) upon Appellant's plea of guilty to Count 20 of the indictment (Transcript Vol 6, Page 702). Appellant was sentenced to imprisonment for three years on his plea of guilty to Count 20 of the indictment. The remaining counts were dismissed by order of Court (Transcript Vol 9, Page 1148). Motion for withdrawal of plea of guilty was made on July 26, 1965 and thereafter heard and denied on August 2, 1965 (Transcript Vol 10, Page 1157). Notice of Appeal herein was filed August 4, 1965 pursuant to Rule 37(a) (1) (2) of the Rules of Criminal Procedure, and the jurisdiction of the Court of Appeals rests upon Section 1291, Title 28, U.S.C.

STATEMENT OF THE CASE

Appellant was charged in the indictment with having on or about January 1, 1961 and continuing to on or about November 26, 1963 with Alfred H. Osborne, Sr. (Transcript Vol A, Page 3, lines 14 to 18) devising a scheme and

artifice to defraud investors and proposed investors and obtain money by way of investments and loans in a duo-rail rapid transportation system and American Spacemaster Development Corporation (sometimes referred to as duo-rail and Spacemaster, respectively). Appellant and co-defendant were also charged in the indictment with having made certain false representations and promises in soliciting such investors and proposed investors, which statements were charged to be false (Transcript Vol 1, Page 39, lines 6 and 7). That said scheme was transmitted by means of wire interstate by telephone communications having been made or caused to be made by the appellant and co-defendant in connection with the alleged fraudulent scheme (Transcript Vol, Page 42, line 7 to Page 48, line 21). Further that appellant aided and abetted in the transportation of certain moneys in interstate commerce, to wit: From Los Angeles County to Kansas City, Missouri (Transcript Vol 1, Page 48, lines 22 to Page 49, line 6), and that appellant conspired with co-defendant in committing the alleged acts as outlined above (Transcript Vol 1, Page 49, line 7 to Page 53, line 6). The case was tried before a jury on 20 counts of the indictment and Appellant entered a plea of guilty to Count 20 of the indictment (Transcript Vol 6, Page 702, line 12 to Page 704, line 1). Whereupon

judgment of conviction upon Appellant's plea of guilty on Count 20 was rendered on June 28, 1965 and appellant was sentenced to imprisonment for three years (Transcript Vol 9, Page 1147, lines 22 to 24) and all remaining counts of the indictment were dismissed by order of Court (Transcript Vol 9, Page 1148, line 12). That on July 26, 1965 a notice of motion to withdraw plea of guilty was made and thereafter heard on August 2, 1965, at which time said motion was denied. (Transcript Vol 10, Page 1157, line 21). Notice of Appeal was filed August 4, 1965. This is the instant matter.

SPECIFICATION OF ERROR

The Court erred in denying Appellant's motion for withdrawal of a plea of guilty as appears in Volume 10, Page 1152, line 4 to Page 1157, line 21 as follows:

"THE CLERK: Item No. 4, case No. 32970-Criminal, United States of America vs. Sam Melnick. This is a hearing on motion of defendant Melnick to withdraw plea of guilty heretofore entered.

"MRS. ROOT: If your Honor pleases, Gladys Root appearing for Mr. Melnick. We have filed a substitution of attorneys previously, and, as your Honor knows, we were not the counsel at the time of the original proceedings.

Mr. Melnick is not here this morning. He was here on the date that the matter was continued by stipulation and, frankly, I don't know whether your Honor ordered a return of Mr. Melnick at that time. I don't believe so, since I come to think about it --

"THE COURT: It isn't necessary that he be here.

"MRS. ROOT: Very well.

"As far as any personal information, if your Honor pleases, I have nothing more than I have filed with your Honor in the original motions, the affidavits and the points and authorities, and we will submit the matter upon the documents as filed, unless your Honor has some question to ask of me that I can't answer.

"THE COURT: I have no questions.

"Mr. Barnett.

"MR. BARNETT: If it please the court, the court, I am sure, well remembers the entire proceedings that took place, and comments passed in the affidavit to the effect that it would be an injustice for Mr. Melnick to be bound by his plea of guilty in the light of what to him was a shocking sentence is in no respect a sufficient reason to withdraw a plea of guilty.

"The court is familiar with the facts of the case. The guilt of the defendant had been established. The plea

of guilty was entered after six or seven days of trial. I think it would be, actually, in this situation, a misuse of the court's discretion to grant the request to withdraw the plea of guilty.

"MRS. ROOT: May I be heard, please?

"THE COURT: Yes.

"MRS. ROOT: If your Honor pleases, I don't believe that that is the only reason that we have set forth as to why Mr. Melnick feels that he should have his opportunity of his day in court, as stated by Mr. Barnett. I call your Honor's attention to the matters as set forth in the motion, and there seem to be many in my way of understanding from what Mr. Melnick, and from what the witnesses have told me personally, and which, incidentally, if your Honor pleases, they wrote out themselves, the affidavits, and we have submitted those originals to you.

"It seems as though the paramount factor in this case was that the will and the decision to enter a plea of guilty by Mr. Melnick was not based upon altogether a voluntary -- not altogether, but was not based upon a voluntary decision in this regard: As I understand, he was led to believe, according to the information that I have submitted to your Honor, that, No. 1, he would be called as a government witness, that he would be called -- of course, whether it be a government witness or a defense witness,

to tell the facts in the case, and that the facts as he knew them were based upon the circumstance that he had been taken, so to speak, using the vernacular of the streets, or had been put upon by Mr. Osborne, and that after he had gotten into this, that he was as much a victim of Mr. Osborne as either of the two persons, or both of the two persons that amounted to complaining witnesses.

"If your Honor pleases, you will note that there are affidavits attached by these two complaining witnesses, Mrs. Yergin and a Mrs. Rabe. I might tell your Honor that both of these ladies came into my office clamoring for the situation of an opportunity to tell to your Honor what they did tell you in the affidavits, and to-wit, that they felt that Mr. Melnick was apparently a victim of Mr. Osborne the same as they were.

"I call your attention to the fact that it would seem to me, and I do not know what the evidence presented to your Honor was, other than what I have been told, that if it is true, as both Mrs. Yergin and the other lady says is true, and if it is true that their testimony did show that at no time any monies were given to Mr. Melnick, save and except for his expenses, of which they themselves knew that he had expended, and that the complaining witnesses

gave monies to Mr. Osborne, and it was Mr. Osborne who had lied, who had misrepresented materially and falsely at all times, and that Mr. Melnick went along only by a passive situation, because he, Mr. Melnick, believed Mr. Osborne, that certainly the facts alone that came before your Honor, in my opinion, would establish a good and meritorious defense for Mr. Melnick.

"THE COURT: Mrs. Root, the trial of Osborne, which Mr. Melnick attended daily, the evidence clearly showed that directly practically all of these fraudulent transactions were handled by Mr. Melnick, not Mr. Osborne. Of course, Mr. Osborne -- I might say, in the first place, that Mrs. Yergin is pretty close to the borderline of being a defendant herself. Mrs. Yergin brought Melnick into this case, as I recall the evidence. Mrs. Yergin was the one that brought him in. The evidence, of course, did not show, and I doubt that she received any of the money that was taken from these people. There is no evidence that she did. When Melnick came into this case, it was Melnick who brought Osborne into the case. Mrs. Yergin brought Melnick in.

"These people were just a lot of suckers who were ripe for plucking, and it was really a rather pitiful thing, because they were retired people, old people, and

they had their savings. Some of them were school teachers, they had their savings that they had saved, and Mr. Melnick is the one who then brought Osborne in.

"Of course, Osborne is an old-time confidence man, and he was smart enough that he came in on the basis -- he never handled any of this money directly. He worked through Melnick. So when the money was collected, and it was all done very deliberately, Melnick would collect the money, and Melnick and Osborne would divide the money. The evidence throughout shows that to be the case.

"Osborne received a sentence of 15 years. Melnick was shown leniency. I don't mind telling you that Melnick was shown leniency, because Melnick came before this court, and at the time he entered his plea he was questioned by the court; he was not only questioned by the court, but he signed a statement, and because he did come before the court and indicated, stated his guilt, and that he was guilty and showed contrition, he was granted leniency and received a sentence of five years -- or three years, I guess it was, yes, three years.

"As far as Melnick was concerned, he was represented by a very able counsel throughout the entire proceedings, and his counsel not only remained here at his side during the time that he entered his plea, but his counsel remained

here at his side during the time that he entered his plea, but his counsel remained here at his side throughout the trial of this case.

"I frankly fail to understand what he possibly could be complaining about.

"I imagine that he probably thought that he would be called as a witness, and he probably thought that he might get probation. But I just could not grant probation in a case which clearly showed not only one transaction, but transaction after transaction where he took the money from these people. And it was a typical fraud case where they are never satisfied. As long as they could keep these people thinking that there was a chance -- if they found they had a little more money, they would take that from them. They would tell them, 'Well, \$1500 more is needed.' They would get that \$1500, and then they would find they had some more, and then they would take that.

"The motion is denied."

QUESTIONS PRESENTED

1. Did the Appellant understand what acts amounted to being guilty of the charge and the consequences of pleading guilty thereto?

2. Did Appellant plead guilty as a result of

1 3. Was Appellant misled into pleading guilty to
2 Count 20 of the indictment?

3 4. Would a manifest injustice result if the
4 Appellant's plea of guilty was allowed to stand?
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A R G U M E N T

1. Did the appellant understand what acts amounted to being guilty of the charge and the consequences of pleading guilty thereto?

Federal Courts have consistently held that a defendant must be conscious of the particular acts which constitute a charge against him in a criminal prosecution. The understanding of these acts together with the understanding of the consequences of pleading guilty to the charge are so deeply ingrained in our federal concept of due process that our courts have been faced with resolving this issue.

One of the more recent United States Circuit Court decisions in which the issue was presented was Edwards v. United States of America, (1958) 256 F.2d 707 at 710.

In the Edwards case the construction of Rule 11, 18 U.S.C.A., Federal Rules of Criminal Procedure was in issue. The rule was stated as follows: "Understanding of the nature of the charge is indispensable to a valid plea of guilty thereto."

The Edwards case construing Rule 11 stated: "Note that under Rule 11 the Court must not only determine that the plea is voluntary, but must determine also that



the defendant understood the 'nature of the charge'; that the Court satisfied itself that appellant understood 'the meaning of the charge' and what acts amount to being guilty of the charge, and the consequences of pleading guilty thereto."

Appellant here respectively points out that appellant changed his plea of not guilty to guilty on Wednesday, May 26, 1965 (Transcript Vol 6, Page 702, line 5 to Page 704, line 10).

In a 20 Count indictment only Count 20 alleged conspiracy by Appellant Melnick and his co-defendant, Alfred H. Osborne, Sr. Still, the Court failed upon accepting Appellant Melnick's plea of guilty to Count 20 to specify Count 20 as the particular count relating to conspiracy.

The Court failed to point out to Appellant Melnick which particular acts, as alleged in the indictment, he was pleading guilty to and why those acts constituted the crime of conspiracy.

Although the Court apparently went to great lengths to question the voluntariness of Appellant Melnick's plea, it appears that the Court still failed in its duty to Appellant in that it failed to ascertain whether or not Appellant understood the nature of the acts.

It is respectively submitted that the Court had at its disposal at the time it accepted Appellant Melnick's plea some 701 pages of court proceedings and testimony from which source it could advise Appellant Melnick of:

A. The acts which constituted the crime of conspiracy.

B. The legal reason why these particular acts constituted the crime of conspiracy; and

C. The legal consequences of pleading guilty to these particular acts constituting the crime.

Bergen v. United States, 145 Fed.2d 181

Kadwell v. United States, 315 Fed.2d 667

Section 31 FRD #5, Feb 1963

2. Did Appellant plead guilty as a result of coercion and duress.

It is respectfully submitted that volumes have been written in the attempt to define what constitutes legal coercion and duress. The one point of agreement by all attempting to define the subject matter has been that "Where the free agency of a defendant to reason and then act upon reasoned conclusions has been destroyed for all practical purposes then the defendant has been subjected to coercion and duress."

In the instant case, the record is replete with evidence of the pressures and stress to which Appellant Melnick was subjected both before the trial and during the trial in the District Court below. (Transcript Vol 1, Page 144, line 25 to Page 145, line 3) (Transcript, Vol 1, Page 148, lines 10 to 21) (Transcript Vol 2, Page 167, lines 5 to 7) (Transcript Vol 2, Page 182, lines 13 to 20) (Transcript Vol 2, Page 281, lines 18 to 20) (Transcript Vol 3, Page 399, lines 18 to 22) (Transcript Vol 5, Page 617, lines 15 to 19) (Transcript Vol 5, Page 637, lines 2 to 10 and line 17).

It is respectfully submitted that outside of the record the wife and family of Appellant Melnick were threatened with force, violence and even death at the hands of co-defendant Osborne should Appellant Melnick testify against co-defendant Osborne during the course of the trial.

The innate force and violence in co-defendant Osborne was forcefully brought to the attention of the trial court when upon court instruction co-defendant Osborne was searched prior to the commencement of the trial before entering the courtroom to determine if he had any deadly weapons hidden on his person or in his briefcase just before entering the courtroom.

(Transcript Vol 1, Page 15, line 25 to Page 30, line 7).

Therefore, when defendant Melnick withdrew his plea of not guilty it was as a direct result of natural fear for his family and himself.

"A sentence rendered upon a truly coerced plea of guilty is subject to collateral attack through habeas corpus, and is also amenable to proceedings under the statute respecting vacation of sentence, as are guilty pleas obtained through promises of leniency by the prosecution or those entered by the accused without knowledge of his rights."

Watts v. United States, 278 F.2d, 247

"To impose upon a defendant the alternatives, that if he persists in assertion of his right and is found guilty, he faces, in view of the trial courts announced intention, a maximum sentence, and if he pleads guilty, there is the prospect of a substantially reduced term, amounts to coercion as a matter of law, warranting setting aside of conviction."

United States v. Tateo, 214 F. Supp. 560

"If it appears that a guilty plea is the product of coercion, either mental or physical, or was unfairly obtained or given through ignorance, fear or inadvertence, it must be vacated as void since it is violative of constitutional safeguards."

United States v. Tateo, 214 F. Supp. 560

United States v. Shailer, 202 Fed.2d 590

United States v. Roland, 318 Fed.2d 406

3. Was Appellant misled into pleading guilty to Count 20 of the indictment?

The events leading up to Appellant's change of plea clearly indicate that Appellant was led to believe that he would be called to appear as a Government witness against co-defendant Osborne. (Transcript Vol 7, ^{Page 905} lines 6 and 7) (Transcript Vol 9, Page 1145, lines 11 to 18).

The state of mind of Appellant, after the continual subjection to the coercion and duress cited above, at the time of changing his plea was such that he felt he owed an obligation to his business partners Estelle Curry and Mrs. Rabe to afford them some measure of protection by changing his plea from not guilty to guilty to Count 20 of the indictment and thereby affording himself an opportunity to testify as to the true set of facts giving rise to the criminal complicity of co-defendant Osborne.

It is respectfully submitted that Appellant Melnick was misled into believing that a change of plea by him was a procedural necessity pre-requisite to his testifying as a Government witness in the case against co-defendant

1 Osborne.

2 United States v. Lias, 173 Fed.2d 685

3 United States v. Shueer, 194 Fed.2d 598

4 Futterman v. United States, 202 Fed.2d 185

5 United States v. Lester, 247 Fed.2d 496

6 Georges v. United States, 262 Fed.2d 426

7 Jares v. United States, 279 Fed.2d 652

4. Would a manifest injustice result if the Appellant's plea of guilty was allowed to stand?

It is respectfully submitted that because of the above cited coercion and duress, as well as the apparent misleading of the Appellant in regard to procedural requisites in trial, that a manifest injustice would result if Appellant's plea of guilty was allowed to stand in that he would for all practical purposes have been denied his day in court.

Under the Fourteenth Amendment to the United States Constitution, procedural due process is demanded for all defendants in criminal prosecutions. It is submitted that the United States Supreme Court in construing what constitutes Procedural Due Process has never envisioned a tight, four-square formula for spelling out the concept in terms of arithmetical precision. Just as the concept of manifest injustice has changed under the growth and pressures of sociological development since our Founding Fathers wrote the Constitution, so must we recognize that apparent procedural due process as applied to a particular individual can

result in a manifest injustice when viewed in the light of special circumstances. Appellant believes that the record below adequately reflects the presence of such special circumstances.

It is respectfully submitted that the only real evidence presented against Appellant below was his own statement upon the change of plea from not guilty to guilty. This fact standing alone appears to be eloquent testimony to the fact that a manifest injustice will result by allowing the plea of guilty to stand when a demonstrated reasonable doubt of Appellant's guilty is so obviously present.

"Concept of 'manifest injustice' applicable under rule providing for withdrawal of guilty plea, permits judge greater latitude than requirements of constitutional due process, and while court might conclude that guilty plea was not involuntary or violative of due process, it might be of opinion that clear injustice was done and thus permit withdrawal of plea."

Pilkington v. United States, 315 Fed.2d 204

"Enough is shouldto create a doubt concerning the voluntariness of the guilty plea."

Pilkington v. United States, 314 Fed.2d 207

CONCLUSION

Wherefore, Appellant respectfully requests that the order denying the motion for withdrawal of the plea of guilty be overturned.

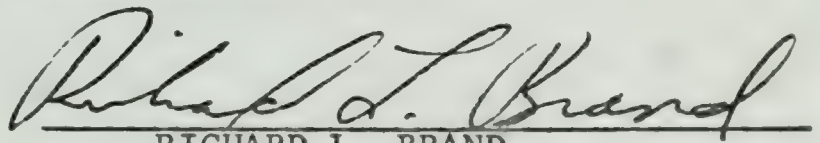
Respectfully submitted,

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RICHARD L. BRAND
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By 
Attorneys for Appellant

CERTIFICATE PURSUANT TO RULE 18(g)
OF THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


RICHARD L. BRAND

[REDACTED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAM MELNICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF

APPEAL FROM
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FOR THE SOUTHERN DISTRICT OF CALIFORNIA
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FILED

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAM MELNICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF

JURISDICTION AND STATEMENT OF THE CASE

Appellant SAM MELNICK was indicted together with co-defendant ALFRED H. OSBORNE, SR., by a Federal Grand Jury for the Southern District of California, Central Division on November 27, 1963, in a twenty-count indictment charging violation of Title 18 U.S.C. §2314 (Counts 1-18); Title 18 U.S.C. §2 (Count 19) and Title 18 U.S.C. §371 (Count 20) [C. T. 2].

A jury trial of both defendants began on May 18, 1965, and on May 26, 1965, appellant withdrew his plea of not guilty to Count 20 of the indictment and pleaded guilty [R. T. 702]. On June 28, 1965, appellant was sentenced to three years imprisonment [R. T. 1147].

On August 2, 1965, a motion to withdraw the plea of guilty

to Count 20 was made by appellant and denied by the Court [R. T. 1157].

On August 4, 1965, a timely notice of appeal was filed from the order denying the motion to withdraw the plea of guilty [C. T. 277].

Jurisdiction of the District Court rested on Title 18 U. S. C. §3231 and §371. This Court has jurisdiction under Title 28 U. S. C. §1291 and §1294.

STATUTE INVOLVED

The appeal in this matter is based upon Title 18 U. S. C. §371 and Federal Rules of Criminal Procedure, Rule 32(d) which provide in pertinent part as follows:

Section 371:

"If two or more persons conspire either to commit any offense against the United States, or to defend the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

Rule 32(d):

"A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence



is imposed or imposition of sentence is suspended;
but to correct manifest injustice the court after
sentence may set aside the judgment of conviction
and permit the defendant to withdraw his plea."

STATEMENT OF THE FACTS

The factual details of the offenses set forth in appellant's brief, bear no relevance to the issue herein, as this appeal is purely and simply directed to the order denying the motion to withdraw the plea of guilty to Count 20 of the indictment. As to that event, the facts are as follows:

After seven days of trial, during which time appellant SAM MELNICK and his attorney actively participated in the defense against the government's charges, appellant voluntarily, upon and with advice of his counsel, withdrew his plea of not guilty to Count 20 and entered a plea of guilty to Count 20 [R. T. 702]. On June 28, 1965, appellant was sentenced to a prison term of three years [R. T. 1148] and the government moved for dismissal of the remaining nineteen counts against him.

On August 2, 1965, appellant moved to set aside his plea of guilty to Count 20 and re-enter his earlier plea of not guilty. The motion was denied [R. T. Vol. 10]. On August 3, 1965, a notice of appeal was filed [C. T. 277] that purported to appeal from the original judgment and the order denying the motion to withdraw the



guilty plea. ^{1/}

On August 4, 1965, a second notice of appeal ^{2/} was filed.

PREFATORY REMARK

The sole issue before this Court is the propriety of the order denying the request to withdraw the plea of guilty to Count 20. The jurisdictional statement contained on page 1 of appellant's brief erroneously extends the scope of this appeal to include an attack upon the judgment of conviction and interim trial rulings. Suffice it to say that such is not the case [footnote 1 and 2 infra]. Accordingly appellee will direct its comments to the sole issue before this tribunal.

SUMMARY OF ARGUMENT

- A. The contentions advanced by the appellant are wholly without merit in law or fact.
- B. The action of the district court in denying the motion to withdraw the plea of guilty is discretionary and

^{1/} After the receipt of said notice of appeal from the appellant the government moved this Court for an order dismissing this appeal on the grounds that it was untimely. This motion was granted by a series of orders of this Court dated October 15, 1965 and November 2, 1965.

^{2/} Appealing only from the order denying the motion to withdraw the plea of guilty, which is the current appeal now before this Court.

defendant entered his plea without advice of counsel and in Kadwell the defendant was far from home, had neither funds nor family and was not advised of the consequences of a guilty plea and in fact was not even aware of the nature of the charge against him. In this case appellant, in addition to verbal inquiry by the court, signed a statement (C. T. 281) showing knowledge, consent, etc.

2. Appellant Was Not Coerced Into
Entering His Plea of Guilty.

Appellee approaches this assertion by appellant with a feeling akin to "awe". A careful reading of this particular argument suggests that the coercion, if any, occurred as follows:

- (A) Appellant Melnick was threatened with violence by codefendant Osborne if Melnick pleaded guilty.
- (B) Appellant Melnick pleaded guilty.
- (C) Appellant Melnick was coerced into pleading guilty by codefendant Osborne.

Appellee submits that this argument apropos coercion is on its face inconsistent.

3. Appellant Melnick Was Not Mislead
Into Pleading Guilty.

Conceding for the purpose of argument only, that appellant's argument (appellant's brief p. 18), properly sets forth the



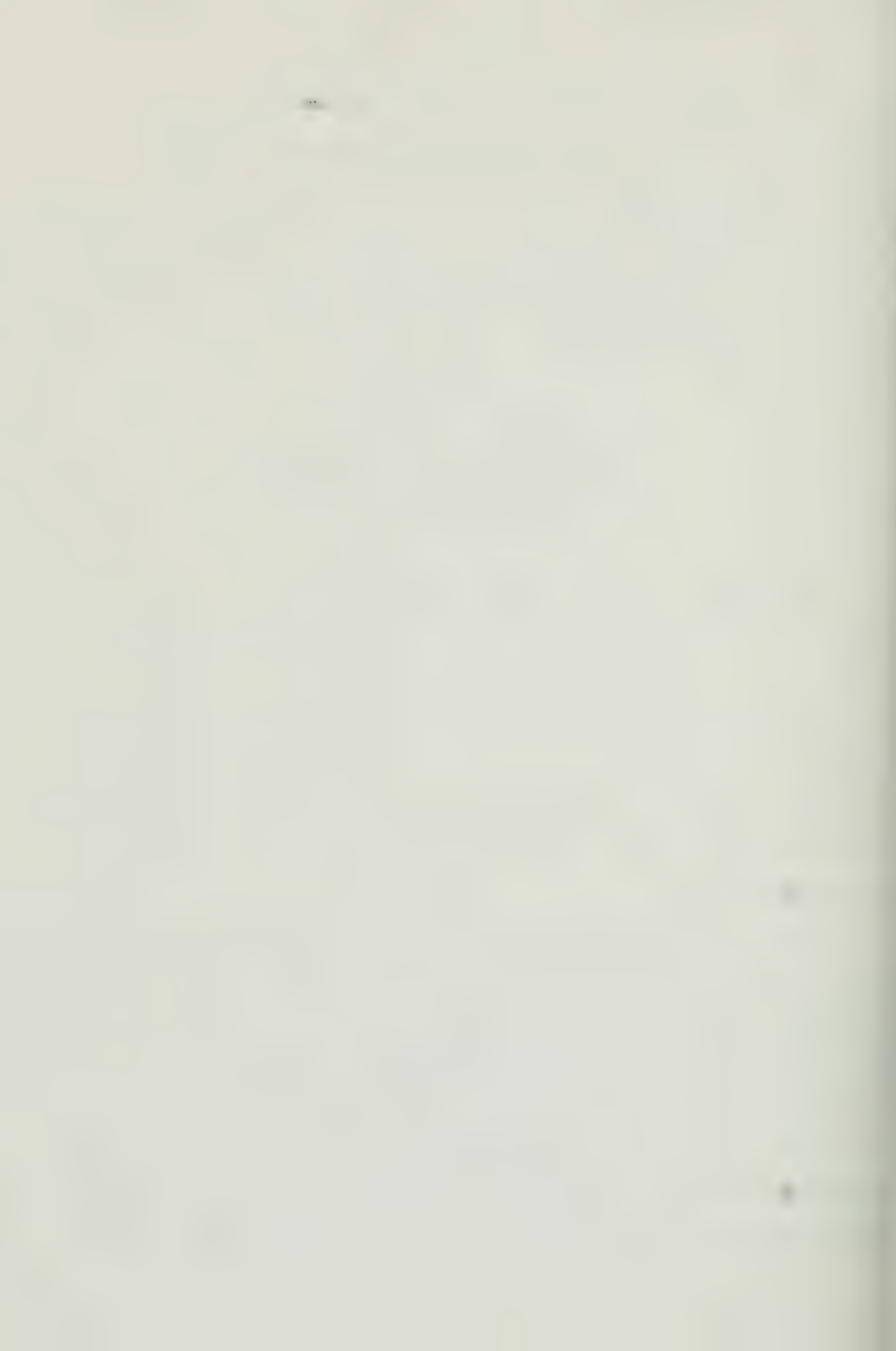
inducement leading to the plea of guilty, it is respectfully submitted that even such facts do not form a basis for reversal.

The cases cited by appellant (p. 19 of appellant's brief), actually hold contrary to appellant's stated position. In fact, Jares v. United States, 279 F.2d 652 (9 Cir. 1960) is an appeal from a ruling by Judge Wm. M. Byrne denying a motion to withdraw a plea of guilty, which order was sustained by this court, as a proper exercise of discretion.

4. No Manifest Injustice Resulted
From the Denial of the Motion to
Withdraw the Plea of Guilty.

Pilkington v. United States, 315 F.2d 204 (4 Cir. 1963), cited by appellant in support of this contention is distinguishable on its facts from the instant appeal. In Pilkington, a sentence permitted by statute (18 U.S.C. §5005, et seq.), was imposed without prior explanation by the Pilkington court to the defendant. In the instant matter the sentence [R. T. 702-704], was clearly and concisely explained.

As to the generalizations contained in appellant's arguments, Futterman v. United States, 202 F.2d 185 (D.C. Cir. 1952), and Schneer v. United States, 194 F.2d 598 at 600 (3 Cir. 1952), cases cited by appellant actually buttress the Government's position herein to the effect that manifest injustice must be clear and cogent and be supported in turn by evidence submitted by the defendant. As the defendant has the burden of proof in establishing manifest injustice



as grounds for reversal.

B. THE ACTION OF THE DISTRICT COURT
IN DENYING THE MOTION TO WITH-
DRAW THE PLEA OF GUILTY IS DIS-
CRETIONARY AND NOT SUBJECT TO
REVERSAL IN THE ABSENCE OF AN
ABUSE OF DISCRETION.

As stated by the court in Criser v. United States, 319 F.2d 849, 850 (10 Cir. 1963), "A defendant who enters a plea of guilty has no legal way to withdraw it and an application for leave to withdraw such plea is addressed to the sound discretion of the trial court". In the instant situation not a scintilla of evidence has been adduced to show or even infer that the lower court did not properly exercise its discretion. Rather rhetoric, in the form of the argument headings by appellant which purport to pose theoretical questions rather than legal contentions, is employed by appellant to raise a wholly irrelevant doubt as to the motive of the appellant in pleading guilty.

Zaffarand v. United States, 330 F.2d 114

(9 Cir. 1964);

Goo v. United States, 187 F.2d 62 (9 Cir. 1951),

cert. den. 341 U.S. 916.

A close scrutiny of the entire record relating to the present issue reveals neither serious nor even casual assertion that the appellant in any way relies upon a claim of innocence as part of his reasons for requesting the withdrawal of his plea of guilty. Though



such an assertion is not mandatory in considering such a motion, it should be advanced in some degree.

As was stated in the case of United States v. Norstand Corp., 168 F.2d 481 (2 Cir. 1948):

"When a defendant who has pleaded guilty makes application to withdraw his plea, he should at the very least allege that he was not guilty of the charge to which he pleaded."

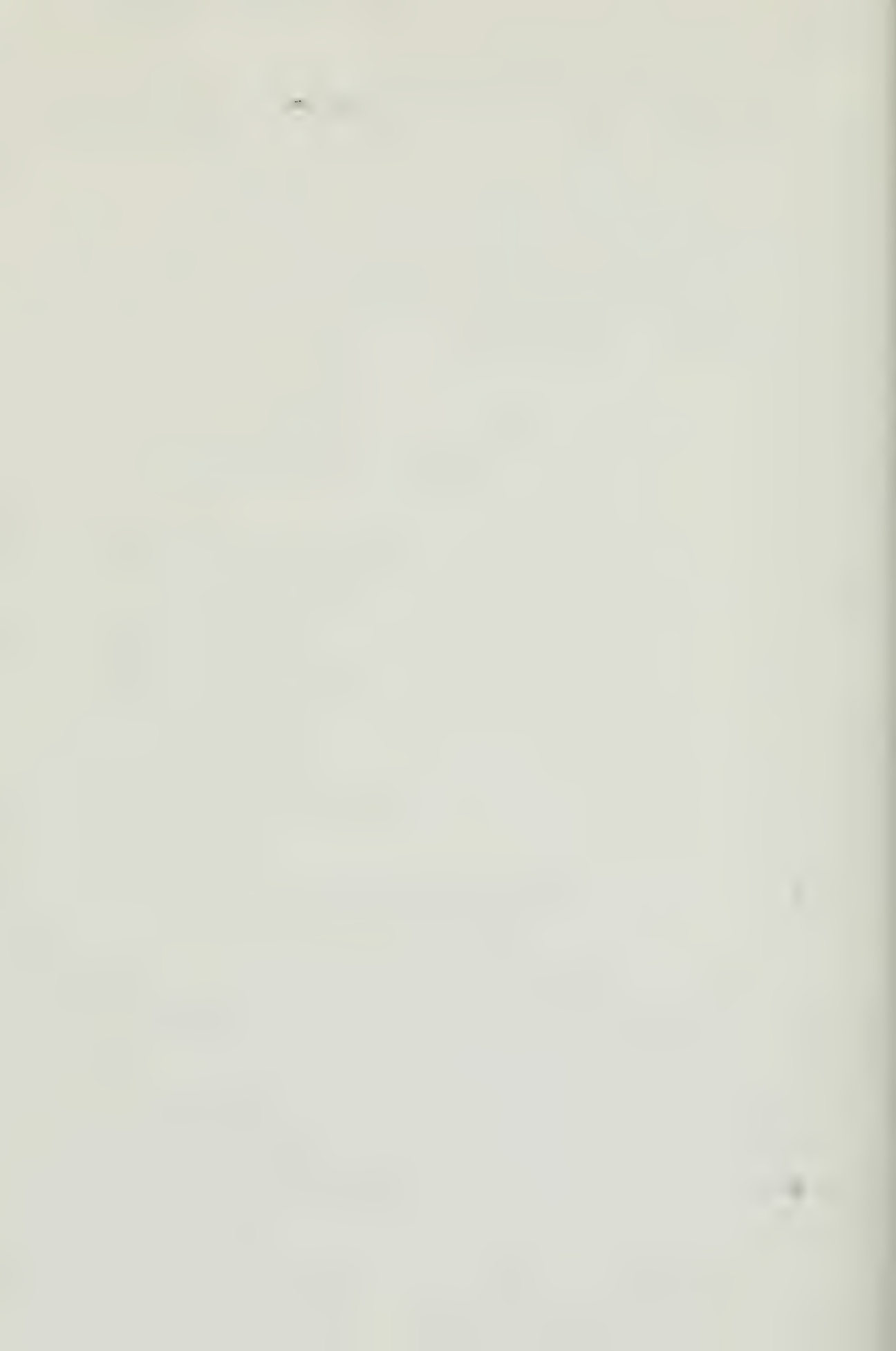
To like effect, please see Everett v. United States, 336 F.2d 979 (D. C. Cir. 1964).

Finally, surprise as to the severity of sentence does not constitute the manifest injustice which must appear before the Court, after sentence, to set aside the judgment of conviction and permit a defendant to withdraw his plea. Further, surprise which results from even erroneous information from defense counsel does not constitute manifest injustice without a clear showing of unprofessional conduct.

Pinedo v. United States ____ F.2d ____
(9 Cir. 6-18-65).

As was stated by the Court in Smith v. United States, 324 F.2d 436, 440 (D. C. Cir. 1963), cert. den. 376 U.S. 957:

"The rule is that manifest injustice does not result from a plea of guilty following erroneous advice of counsel as to the penalty which could be imposed."



To like effect please see:

Everett v. United States, supra;

Verdon v. United States, 296 F.2d 549 (8 Cir. 1961)

Georges v. United States, 262 F.2d 426

(5 Cir. 1959);

United States v. Sheer, 194 F.2d 598 (3 Cir. 1952).

In this case the trial court properly exercised its discretion.

CONCLUSION

For the reasons above submitted, it is respectfully requested that the appeal be denied and the order below affirmed.

Respectfully submitted,

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Attorneys for Appellee,

United States of America.



CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Jules D. Barnett

JULES D. BARNETT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 14 1967

SAM MELNICK,

Appellant,

v.

UNITED STATES OF AMERICA,

20618

Appellee.

APPELLANT'S REPLY BRIEF

APPEAL FROM
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

JAN 3 1966

~~FRANK H. SCHMID, CLERK~~

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAM MELNICK,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

The jurisdictional statement, statement of the case, specification of error and questions presented are incorporated herein as fully set forth in Appellant's Opening Brief.

REPLY TO APPELLEE'S PREFATORY REMARK

No one other than this Honorable Court can extend the scope of an appeal before it. The allegation of an erroneous extension of scope of this appeal is not founded in fact since the opening brief sets forth the appeal from orders denying withdrawal of a plea of guilty and expressly refers to the transcript, Volume 10, at Page 1157, under date of August 21, 1965.

The attempt by Appellee to relegate to footnotes the facts reflected in 700 pages of transcript leading up to the change of plea by Appellant Melnick deprives this Honorable Court of the opportunity of independent review and is as much a restriction of the scope of this appeal as Appellee's suggestion that Appellant is attempting arbitrarily to extend the scope; which is as aforesaid the function of this Honorable Court.

REPLY TO ARGUMENT A

Appellant agrees completely with the citation of the Edwards case as the law presently. The recitation in the opening brief of the test is easily applied on the facts of the subject appeal. It is pointed out in the opening brief that there was a failure to set out what actions Appellant was pleading guilty to and why those acts constituted the crime of being guilty and primarily "What acts amount to being guilty of the charge."

Edwards v. United States, 256 Fed.2d 707 at 710

Therefore, it is respectfully submitted that the Appellee concurs in what tests should be applied and this Appellant respectfully submits that an application of that test will result in a determination by this Honorable Court that there was a failure to advise the Appellant of the acts which constituted a crime of conspiracy.

The Appellant respectfully contends that the syllogistic reasoning set forth by Appellee fails in that the oversimplification deletes the impact of co-defendant Osborne's fear of Appellant's testimony.

Appellant has indicated that the threats and violence relate to the matter of testimonial compulsion in that co-defendant Osborne, an attorney, knew of the right against self-incrimination in a criminal proceeding by defendant and that there would be no testimony against him if Appellant Melnick maintained his not guilty plea; however, after many days of trial, co-defendant Osborne determined that the change of plea by Appellant Melnick would not result in testimony and therefor he coerced Appellant Melnick into pleading guilty. The absence of testimony by Appellant Melnick is obvious.

We are in accord with the Appellee and their statements that reference to the Appellant's cases indicate that the determination of a motion to withdraw a plea of guilty is within the discretion of the Court. However, the argument advanced by Appellant is not at this juncture that of discretion, but that Appellant was misled. This is a matter for determination by this Honorable Court and if it is found that Appellant was misled, this is a separate and independent ground for reversal.

It is admitted that each appeal is distinguishable

on its fact from another. We must look to precedent for guidelines. Appellant has cited numerous cases relating to the concept of manifest injustice. It is not suggested that Pilkington v. United States, 315 Fed.2d 207 or any other is similar to the instant matter, nor has appellant asserted that the sentence was not clearly and concisely explained; rather, Appellant contends that he was misled.

REPLY TO ARGUMENT B

Appellant concurs that the determination of the application to withdraw plea is within the sound discretion of the trial court and that an assertion of innocence is not mandatory. However, the very issue in this appeal is whether the trial court did not exercise sound discretion.

CONCLUSION

Therefore Appellant reiterates his prayer and respectfully requests that the order denying motion for withdrawal of plea of guilty be overturned.

Respectfully submitted,

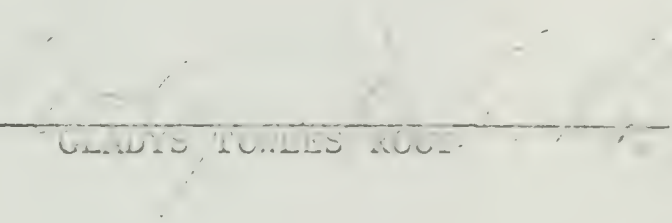
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Attorneys for Appellant

CERTIFICATE PURSUANT TO RULE 15(d)
OF THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

I certify that in connection with the preparation of this brief, I have examined Rules 13 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



GLADYS TOMLES ROOT

FEB 14 1967

No. 20,619

United States Court of Appeals
For the Ninth Circuit

HELEN FONG, also known as Helen
Fong, also known as Fong Hong May,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from Judgment of the United States District Court
for the Northern District of California,
Southern Division

Honorable Fred M. Taylor, Judge for the District of Idaho,
Sitting by Special Assignment

APPELLANT'S OPENING BRIEF

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FILED

MAY 18 1966

WM. B. LUCK, CLERK



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No. 20,619

United States Court of Appeals

For the Ninth Circuit

HELEN FONG, also known as Helen
Fong, also known as Fong Hong May,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from Judgment of the United States District Court
for the Northern District of California,
Southern Division

Honorable Fred M. Taylor, Judge for the District of Idaho,
Sitting by Special Assignment

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

On May 5, 1964 plaintiff filed herein her Complaint
for Refund of Internal Revenue Taxes. Jurisdiction
of the District Court was based on Title 26 U.S.C. sec-
tion 7422, Title 28 U.S.C. sections 1346(a)(1), 1402
(a)(1), and the Internal Revenue Law of the United
States. (C. 1.)¹

The Clerk's Transcript will be designated "C." Page refer-
ences precede the colon and line references, where specified, fol-
low the colon.

On August 16, 1965 judgment was entered dismissing the complaint with prejudice as to all cause of action alleged. (C. 48.) Notice of Appeal was filed September 13, 1965. (C. 49.) Jurisdiction of the United States Court of Appeals for the Ninth Circuit is founded on 28 U.S.C. section 1291.

STATEMENT OF THE CASE

This is an action for refund of certain sums of interest paid by plaintiff on the income tax liabilities of her former husband, Fong Poy, and herself for the years 1939 through 1946.

Jeopardy assessments covering those liabilities were made by the Commissioner in 1951. Plaintiff and Fong Poy thereafter filed Petitions for Redetermination which were pending until 1961 when a settlement was reached on the basis of which the Tax Court entered decisions fixing the amounts of the liabilities. The 1951 assessments included interest which had accrued to the date of the assessments, but only the amounts of taxes and penalties were fixed by the Tax Court decisions (C. 43:3-4).² The 1951 assessments, thus redetermined by the Tax Court, have since been paid in full.

In addition, the government has collected from plaintiff, not only interest on the tax liabilities from the dates they were due, but also interest on the

²The Tax Court has consistently declined jurisdiction to determine interest. This is discussed in detail later in this brief and it has significance in interpreting the code sections here involved.

interest which had accrued as of the date of the 1951 assessments. The Complaint in this action seeks a refund of such compound interest in amounts totaling \$10,473.01 together with statutory interest thereon from the dates of payment in 1959 and 1960. (C. 1-13.)

The case was submitted to the District Court upon an Agreed Statement of Facts. (C. 40-45.) There was no issue of fact in the case, and this appeal involves only a question of law.

SPECIFICATION OF ERROR

The District Court erred in concluding that interest on the interest included in the 1951 jeopardy assessments was legally charged and collected. (C. 47:9-14.)

ARGUMENT

THE ISSUE

Was the government entitled to collect interest on the interest included in the 1951 jeopardy assessments for the period of time prior to the Collector's notice of demand following the decision of the Tax Court?

The answer to that question poses as knotty a problem of statutory interpretation as one is likely to find, even in the tangled morass of the Internal Revenue Code. There are a handful of prior decisions on the question, but they are in conflict; the opinions are conflicting, and none of them fully considers all aspects of the problem.³ Before discussing the prior cases in

³See pages 11 to 17, *infra*.

detail, we will attempt to explain the problem in its statutory framework and to analyze the various sections of the Code which are involved.

To assist the Court, we have copied as an appendix to this brief the pertinent sections of the 1939 Revenue Code.

The collection of interest on interest was abolished entirely by Congress in the 1954 Code (Section 6601(f)(2)). This case arises under the 1939 Code, however, which did authorize the collection of interest on interest in certain circumstances. Plaintiff contends that those circumstances are not the circumstances of this case; that under the 1939 Code interest on interest was payable only after a deficiency assessment became final. Thus, if the taxpayer petitioned the Tax Court for a redetermination of the Commissioner's assessment there was no compounding of interest until after the finality of the Tax Court's decision.

Section 292(a) of the 1939 Code stated the general rule that interest at 6% upon the amount determined as a deficiency was assessed at the same time as the deficiency to be paid upon notice and demand from the Collector as part of the tax. Under that section interest was computed from the date prescribed for payment of the tax to the date the deficiency was assessed.

The collection of additional interest on the interest thus assessed was authorized in certain circumstances by section 294(b). It provided that if a deficiency, or any interest or additional amounts assessed therewith, was not paid in full within ten days from the date

notice and demand from the Collector, there should be collected interest upon such unpaid amount at a rate of 6% from the date of such notice and demand until it was paid.

In the ordinary case, the Commissioner was required to send a deficiency notice to the taxpayer before any deficiency could be assessed. The taxpayer then had ninety days within which to petition the Tax Court for a redetermination. If such a petition was filed, there was no assessment and no notice and demand for payment of the tax until after the Tax Court's decision was final (section 272(a)). There was thus no compounding of interest during the pendency of the case in the Tax Court.

If the Commissioner had followed that procedure in the present case, there would have been no ground whatever for compounding interest on interest during the ten years that the taxpayer's cases were pending in the Tax Court. There would have been no compounding of interest until the assessment and notice and demand from the Collector following the Tax Court decision in 1961.

The following chart illustrates the timetable involved.

<u>1961</u>			
Deficiency Notice	Tax Court Petitions Pending	Tax Court Decision	Notice of Demand for Payment
—No interest on interest during this period—			

In this case, however, the Commissioner chose to make the jeopardy assessment procedure provided by section 273 of the 1939 Code. As a result of the con-

fusing interrelationship between section 273 and section 294(b) (the general section which provides for interest on interest following an assessment), the government claims the right to collect interest on interest for the period during the pendency of the Tax Court proceedings—a right it clearly would not have except for the fact that this was a jeopardy assessment as distinguished from an ordinary assessment.

Section 273 provided that if the Commissioner believed that the collection of a deficiency would be jeopardized by delay, he might assess such deficiency immediately without a prior notice to the taxpayer and without a prior opportunity to litigate the matter before the Tax Court. The Commissioner was then entitled to enforce collection of the tax so assessed unless the taxpayer was able to post a stay bond in double the amount as to which the stay was desired. Whether or not such a bond was filed, the taxpayer had the same right to petition for a redetermination by the Tax Court as in the case of an ordinary proposed deficiency assessment.

Taxpayers Helen Fong and Fong Poy did petition the Tax Court for a redetermination, but did not post a bond to stay collection. (C. 41:24-27.) Since the taxpayers owned real property of a value in excess of the liabilities assessed, the Commissioner made no attempt to enforce collection during the time that the cases were pending in the Tax Court. For all practical purposes, the matter was thus handled as if it were not a jeopardy case (or if it were, that a bond to stay collection had been filed).

Notwithstanding this, the government has collected interest on interest for the period commencing with the 1951 assessments and all during the pendency of the cases in the Tax Court.

<u>1951</u>		<u>1961</u>	
Jeopardy	Tax Court	Tax Court	Notice of
Assessment.....	Petitions Pending	Decision	Demand for
			Payment
—Interest on interest collected for this period—			

The question here is whether the 1939 Code required such an anomalous result merely because the Commissioner arbitrarily chose to believe that collection would be “jeopardized by delay,” and made a summary assessment under section 273.

ANALYSIS OF THE CODE SECTIONS

The provision for jeopardy assessments has been in the Code since 1924. Its general purpose is plain: to secure to the government immediate control of the taxpayer’s property in cases where the lapse of time might result in failure of collection. The Commissioner is given wide discretion, which is not subject to review (*Adler v. Nicholas* (D.C. Colo. 1946) 70 F. Supp. 514; *Foundation Co. v. U.S.* (Ct. Cl. 1936) 15 F. Supp. 229; *Veeder v. Comm.* (7th Cir. 1929) 36 F. 2d 342), to determine which cases are proper subjects for jeopardy assessment.

The Code was amended in 1953 to give the Commissioner the further authority to abate a jeopardy

assessment previously made if he finds that jeopardy does not exist. (Section 273(k).) The Senate Report accompanying the bill which added that provision contains the following:

Under existing law if the Bureau of Internal Revenue believes that ultimate collection of a tax is in danger, it may make a so-called jeopardy assessment. *This is an arbitrary assessment designed to get control of available assets of the taxpayer pending final determination of the liability, if any.*

* * *

This bill simply permits the revocation of a jeopardy assessment whenever it appears that there is in fact no danger of losing any tax which may be due . . . (1953 U.S. Code Cong. and Adm. News, p. 2398.) (Emphasis added.)

Such being the Congressional understanding of the purpose of jeopardy assessments, and the Commissioner having been given such broad discretion, it seems unlikely that Congress ever intended to exact an additional sum of money from taxpayers in jeopardy cases, whether in the form of interest on interest, or otherwise.

When a taxpayer against whom a jeopardy assessment has been made files his petition for redetermination, the Tax Court determines the amount which should have been assessed, just as in the case of an ordinary deficiency (compare section 273(i) with section 272(b)). The Tax Court does not determine interest deficiencies in either case, as it has been repeatedly held that the Tax Court has no jurisdiction over the question of interest. (*Commissioner v. Kilpatrick's Estate* (6th Cir. 1944) 140 F.2d 887; *U. S. v.*

Globe Indemnity Co., (2nd Cir. 1938) 94 F.2d 576, 578; *Fuller v. Commissioner* (1953) 20 T.C. 308, 318.)

The amount determined by the Tax Court as the deficiency may be greater or less than the jeopardy assessment, and greater or less than the amount previously collected. Therefore, special provision was made in section 273(i) for collecting the difference or refunding the excess to the taxpayer. Section 297 made special provision for collecting interest after the ruling of the Tax Court in these jeopardy cases. (Compare the last sentence of 297 with the first sentence of 294(b), which applied to assessments generally.)

The pertinent portions of sections 273(i) and 297 are as follows:

§273(i). *Collection of unpaid amounts.*

When the petition has been filed with the Tax Court and when *the amount which should have been assessed has been determined by a decision of the Tax Court* which has become final, then any unpaid portion, [*of such amount*] the collection of which has been stayed by the bond, shall be collected as part of the tax upon notice and demand from the collector, and any remaining portion of the assessment shall be abated . . . (Emphasis and bracketed explanation added.)

§297. *Interest in case of jeopardy assessments.*

In the case of *the amount collected under Section 273(i)*, there shall be collected at the same time as such amount, and as a part of the tax, interest at the rate of 6% per annum *upon such amount* from the date of the jeopardy notice and demand to the date of notice and demand under section 273 (i), . . . (Emphasis added.)

It is very clear that the principal amount on which the interest is to be calculated pursuant to section 297 is the amount determined by the Tax Court as the amount of the deficiency, and collected pursuant to section 273(i). *As stated above, this amount does not include interest, as the Tax Court never determines interest in fixing the amount of the deficiency.* On this amount fixed by the Tax Court, the Collector (under section 297) collects interest at the rate of 6% per annum from the date of the jeopardy notice and demand to the date of notice and demand after the determination by the Tax Court has become final. The last sentence of section 297 provides for additional interest on those amounts only from the date of the notice and demand under section 273(i).

Section 297, therefore, does not authorize any compounding of interest prior to the notice and demand which follows the Tax Court's decision. Interest on interest in jeopardy cases thus commences at the same point in time as in ordinary cases, that is, after the Tax Court's determination becomes final and the Collector has issued his notice and demand for payment. This is consistent with the purpose of jeopardy assessments, which concerns the *collectibility*, not the *amount* of the tax liability.

There is no justification for penalizing a taxpayer in terms of his total ultimate tax liability as a result of his having been singled out for the arbitrary jeopardy assessment procedure. Particularly is this so when one considers that there is no provision for a review of the Commissioner's determination of, or

abatement of, jeopardy assessments. In this case the government did not enforce collection for years, an indication that collection of the tax was not in much jeopardy.

Absent a very clear and express statutory mandate, the Courts should not infer a Congressional intention that jeopardy assessments carry an additional dollar liability in the form of compound interest from a point earlier in time than would be true of an ordinary assessment.

THE CASES

The first reported case to have considered this question was apparently *Signal Gasoline Corporation v. United States* (DC SD Cal. 1942) 46 F. Supp. 276, in which the court held, erroneously in our view, in favor of the government. In that case, collection had been stayed during pendency of the case in the Tax Court by the filing of a bond. Section 294(b) was therefore expressly rendered inapplicable by the provisions of section 294(c). The court in the *Signal* case, correctly, looked to sections 273(i) and 297. It reasoned, again correctly, that 297 provided for interest on the amount collected under section 273(i), but based on the mistaken belief that the amount collected under 273(i) included interest concluded, incorrectly, that this authorized the collection of interest on interest.

As explained above, the amount collected under section 273(i) is the amount which should have been

assessed as determined by the Tax Court—*an amount which never includes interest.*

The opinion in the *Signal* case dismisses this with the observation, “The plaintiff’s contention that the Board [Tax Court] lacks jurisdiction to consider and did not enter a finding of interest is untenable. Assessment of interest was authorized by section 273(a).” (46 F. Supp. 276, 281.) That statement involves a non sequitur. The fact that interest is assessed *by the Commissioner* in a jeopardy case under section 273(a), just as interest is included in ordinary assessments, does not confer jurisdiction *on the Tax Court* over that aspect of the assessment. It has long been settled—regarded as axiomatic among Tax Court practitioners—that the Tax Court does not include any determination of interest in its decisions. It did not do so in the present case, in any of the cases cited herein, and so far we know, has never done so.

In *Symonides v. Crenshaw* (DC E Va., 1953) 53-2 U.S.T.C. 9639, the same result was reached, this time in a case where no bond had been filed to stay collection. Without any apparent awareness of the complexity of the problem, the opinion merely cited section 294(b) and let it go at that.

While at first blush section 294(b) seems relevant, it really has no application to the ultimate liability of a taxpayer in a jeopardy case which goes to a decision in the Tax Court. Section 294 is the general section providing for various additions to the tax in case of nonpayment following an assessment. If applied to a jeopardy case in which a Tax Court petition were

pending, it would result in collection of interest on the amounts assessed before the amounts had been redetermined. But that would be a temporary situation, subject to correction after the Tax Court decision pursuant to Section 273(i). That section provides for a credit or refund of any amount collected in excess of "the amount which should have been assessed." Accordingly, any interest collected pursuant to 294(b) during the pendency of the Tax Court case would be credited or refunded because it would necessarily be in excess of "the amount which should have been assessed" since the amount which should have been assessed would date back to the original jeopardy assessment. Ultimately, then, the authority for collecting interest is contained in section 297, which provides that in addition to the amount collected under section 273(i), i.e., the amount which should have been assessed, "there shall be collected interest from the date of the jeopardy notice and demand to the date of the notice and demand under section 273(i)."

In other words, section 294(b) permits the Collector to charge interest on assessments in any case, jeopardy or otherwise, in which the taxpayer permitted the assessment to become final. Absent a petition to the Tax Court, such would be controlling and interest on interest would be payable from ten days after the notice and demand for collection following the finality of the assessment. In ordinary cases, the Tax Court petition stays everything, the assessment as well as collection of interest. In a jeopardy case, the taxpayer is entitled to stay collection only by filing a bond. If

such is done, collection is stayed until after the decision of the Tax Court.⁴ If a bond is not filed, the Collector is entitled to go ahead and collect the assessment together with interest thereon, but the ultimate liability of the taxpayer is not determined until after the Tax Court decision. At that time any amounts (whether tax, penalty or interest) collected during the pendency of the Tax Court proceeding by virtue of the fact that no bond was filed to stay collection are to be credited or refunded to the extent that such amounts exceed the amount of that ultimate liability.

In *Crolich v. United States* (DC SD Ala., 1956) 144 F. Supp. 109, a taxpayer in precisely the same position as the plaintiff in this case was granted a refund of interest on interest. The Court analyzed section 273(i) and 297, and came to the conclusions expressed herein. The Court recognized the error of the *Signal* and *Symonides* cases and declined to follow them.

Not long thereafter the opposite result was reached in *Grimsley v. Patterson* (DC ND Ala., 1957) 57-2 U.S.T.C. 10,025 and *Brinck v. United States* (DC D Mont., 1959) 173 F. Supp. 286. Those cases relied heavily on the language of section 294(c) exempting the application of 294(b) where a bond has been filed, inferring therefrom that section 294(b) is applicable where a bond is not filed. That may be so, but as explained above, the taxpayer's *ultimate* liability is determined pursuant to sections 273(i) and 297 *after* the Tax Court decision.

⁴Collection of the assessed amounts is stayed by the terms of section 273(f); collection of the additional interest authorized by Section 294(b) is stayed by the terms of Section 294(c).

The rule of the *Grimsley* and *Brinck* cases would make the result turn on whether or not the victim of a jeopardy assessment was able to post a bond. Taxpayers unable to post a bond to stay collection would pay additional interest. Taxpayers able to post such a bond would escape payment of such additional interest.

That result would seem to violate due process. Arbitrarily to discriminate against one class of persons, without any reasonable basis for the classification, is a violation of the Due Process clause of the Fifth Amendment. (*Bolling v. Sharpe* (1954) 347 U.S. 497, 98 L. ed. 884; see *Charles C. Steward Machine Company v. Davis* (1937) 301 U.S. 548, 584, 585, 81 L. ed. 1279, 1290.) Statutes, the effect of which are to grant or deny a right or privilege depending upon a person's ability to pay, have been declared unconstitutional as violative of Due Process and Equal Protection. (*Griffin v. Illinois* (1956) 351 U.S. 12, 100 L. ed. 891; *Eskridge v. Washington State Board* (1958) 357 U.S. 214, 2 L. ed. 2d 1269.)

When faced with that argument, the Court of Appeals of the First Circuit in *Ginsburg v. United States* (1st Cir., 1960) 278 F.2d 470, reverted to the reasoning in the *Signal* case and said that interest on interest is payable whether or not collection is stayed by the filing of a bond. This avoids the due process problem nicely, or at least one aspect thereof,⁵ but it

⁵The question would still remain, whether due process is satisfied by an arbitrary jeopardy determination, not subject to review, which results in exaction of a penalty in the form of additional interest.

does terrible violence to the meaning of sections 297 and 273(i).

On petition for rehearing in *Ginsburg*, it was called to the Court's attention that the "amount which should have been assessed" referred to in section 273(i) does not include interest because the Tax Court does not have jurisdiction to determine interest. The Court then fell into manifest error. It said:

This may well be true with regard to deficiencies determined and assessed in the normal manner under section 272. See *Commissioner of Internal Revenue v. Kilpatrick's Estate*, 6 Cir., 1944, 140 F.2d 887. But section 273(c), dealing with jeopardy assessments, specifically provides that "the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency *and of all amounts assessed at the same time in connection therewith.*" (ital. supplied). This is to be compared with the more limited language of section 272(e), applicable to normal deficiency proceedings. Also compare section 273(i), "Collection of unpaid amounts," with section 272(b), "Collection of deficiency found by Tax Court," which further points up the distinction between jeopardy-assessment procedure and normal deficiency procedure. (278 F.2d 470, 473.)

The above statement is squarely contrary to the established rule that the Tax Court does not determine interest, not only in ordinary assessment cases (*Commissioner v. Kilpatrick's Estate, supra*), but also in jeopardy cases (*Fuller v. Commissioner, supra*, (1953) 20 T.C. 308, 318). That this is so is exemplified by the present case where the Tax Court decision omits any reference to interest. The same thing was true of each of the jeopardy cases which have discussed the prob-

lem of interest on interest and which are cited and discussed above.

The language of section 273(c), relied on in the opinion on rehearing in the *Ginsburg* case above, is no more broad than the language of section 272(e) applicable to ordinary deficiency assessments, which provides in a portion not quoted by the *Ginsburg* opinion, "the Board shall have jurisdiction . . . to determine whether any penalty, additional amount or addition to the tax should be assessed— . . ."

Regardless of the language of those sections, which may seem broad enough to authorize the Tax Court to determine interest deficiencies, the law is clearly to the contrary. Tax Court decisions do not include interest and never have. The conclusion is therefore inescapable that the combined effects of 273(i) and 297 do not authorize the collection of interest on interest, for they authorize only the collection of interest on the amounts determined by the Tax Court. Stated another way, the Tax Court's jurisdiction to determine interest, if it has such jurisdiction, is irrelevant because it did not exercise any such jurisdiction in this case.

Based as they are on an erroneous premise, the *Ginsburg* and *Signal* cases are wrong and ought not to be followed.

CONCLUSION

The question presented here has no importance for future cases, since the statutory ambiguity involved was resolved by the 1954 Code. The question does have

importance for the taxpayer in this case. It is a matter of doing her simple justice. There is no good reason why the taxpayer in this case should pay compound interest during the period that her case was pending in the Tax Court, a period of nearly ten years, merely because the Commissioner in 1951 determined that he would make a jeopardy assessment.

Inasmuch as compound interest on tax liabilities is disfavored generally, and in view of the fact that such interest in a jeopardy case would constitute a penalty based upon the exercise of administrative discretion which is not subject to review, plaintiff's position in this case ought to be sustained unless there is a clearly manifest Congressional intention to the contrary. Far from such being the case, a careful analysis of the Code sections indicates Congress never intended interest to be collected on assessed interest until after the assessment became final and ten days had elapsed following a notice and demand for collection. The earlier decisions to the contrary are confused and conflicting, have ignored settled principles, and ought not to be followed.

Dated, Oakland, California,
May 11, 1966.

Respectfully submitted,

STARK & CHAMPLIN,

By JOHN F. WELLS,

Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN F. WELLS,
Attorney for Appellant.

(Appendix Follows)

Appendix.

Appendix

PROVISIONS OF THE INTERNAL REVENUE CODE OF 1939.

(References to the Board of Tax Appeals refer, after 1942, to the Tax Court. See Section 504 of the Revenue Act of 1942, 56 Stat. 798.)

SEC. 272. Procedure in General.

[Sec. 272(a)]

(a) (1) Petition to Board of Tax Appeals.—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetyth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of defi-

ciency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address. If the notice is addressed to a person outside the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days.

(b) **Collection of Deficiency Found by Board.**—If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

SEC. 273. Jeopardy Assessments.

[Sec. 273 (a)]

(a) **Authority for Making.**—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

Amendments: None.

[Sec. 273 (b)]

(b) Deficiency Letters.—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272 (a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment.

[Sec. 273 (f)]

(f) Bond to Stay Collection.—When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final, together with interest thereon as provided in section 297. If any portion of the jeopardy assessment is abated by the Commissioner before the decision of the Board is rendered, the bond shall, at the request of the taxpayer, be proportionately reduced.

[Sec. 273 (h)]

(h) Waiver of Stay—Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer

shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If the Board determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Board is rendered the bond shall, at the request of the taxpayer, be proportionately reduced.

[Sec. 273 (i)]

(i) Collection of Unpaid Amounts.—When the petition has been filed with the Board and when the amount which should have been assessed has been determined by a decision of the Board which has become final, then any unpaid portion, the collection of which has been stayed by the bond, shall be collected as part of the tax upon notice and demand from the collector, and any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 322, without the filing of claim therefor. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the collector.

SEC. 292. Interest on Deficiencies.

[Sec. 292 (a)]

(a) General Rule.—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272 (d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion.

SEC. 294. Additions to the Tax in Case of Nonpayment.

[Sec. 294 (b)]

(b) Deficiency.—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and

demand until it is paid. If any part of a deficiency prorated to any unpaid installment under section 272 (i) is not paid in full on or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

[Sec. 294 (c)]

(c) Filing of Jeopardy Bond.—If a bond is filed, as provided in section 273, the provisions of subsection (b) of this section shall not apply to the amount covered by the bond.

SEC. 297. Interest in Case of Jeopardy Assessments.
[Sec. 297]

In the case of the amount collected under section 273 (i) there shall be collected at the same time as such amount, and as a part of the tax, interest at the rate of 6 per centum per annum upon such amount from the date of the jeopardy notice and demand to the date of notice and demand under section 273 (i), or, in the case of the amount collected in excess of the amount of the jeopardy assessment, interest as provided in section 292. If the amount included in the notice and demand from the collector under section 273 (i) is not paid in full within ten days after such notice and demand, then there shall be collected, as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid.

FEB 14 1967

No. 20,619

United States Court of Appeals
For the Ninth Circuit

HELEN FONG, also known as HELEN
POY, also known as FONG HONG MAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the Judgment of the United States
District Court for the Northern
District of California

BRIEF FOR THE APPELLEE

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On Appeal from the Judgment of the United States
District Court for the Northern
District of California

BRIEF FOR THE APPELLEE

OPINION BELOW

The findings of fact and conclusions of law of the District Court (R. 46-47) are not officially reported.

JURISDICTION

This appeal involves federal income taxes. The taxable years and the taxpayers involved,¹ the dates

¹As discussed in more detail, *infra*, Helen Fong, also known as Helen Poy, also known as Fong Hong May (hereinafter referred to as the appellant), pursuant to a final court decree of divorce, was awarded certain community property subject to any unpaid income tax liabilities of her own and her husband, Fong Poy, for the years 1931 through 1946, inclusive. (R. 42.) The claims for refund in issue arose as a result of payments made by the appellant with regard to her own, Fong Poy's, and joint tax obligations for certain of these years. The claims were made by the appellant alone since she made the payments, and the instant action was brought by the appellant (without the joinder of Fong Poy) for the same reason.

of filing of refund claims and the amounts of these claims, the dates these claims were disallowed, and the dates on which the amounts claimed (as well as other amounts paid for the respective years) were paid are as follows:

taxable Year	Taxpayer	Date of Refund Claim	Amount of Refund Claim	Date Refund Claim Disallowed	Payment Dates of Claimed Amounts	R
39	Fong Poy and Appellant	1-29-62	\$ 1,785.99	5-8-62	12-29-59; 2-4-60; 12-28-60	
40	Fong Poy and Appellant	1-29-62	3,693.78	5-8-62	12-29-59; 8-30-60; 3-24-61	
41	Fong Poy and Appellant	1-29-62	1,827.98	5-8-62	3-16-62; 12-29-59; 2-4-60; 3-24-61	
42	Fong Poy	12-27-61	10,404.26	5-8-62	3-15-43; 6-15-43; 12-29-59; 2-4-60; 8-30-60; 3-24-61; 12-27-61	
43	Appellant	1-29-62	349.81	5-8-62	9-4-59; 2-4-60; 9-6-61	
43	Fong Poy	3-22-62	5,629.64	5-8-62	9-4-59; 8-30-60; 2-19-62	
44	Fong Poy	12-27-61	5,410.00	5-8-62	3-15-45; 4-15-59; 12-29-59; 8-30-60	
44	Appellant	2-13-63	1,532.25	8-13-63	9-4-59; 9-6-61; 3-4-62; 12-27-62	
45	Fong Poy	12-27-61	5,490.92	5-8-62	3-15-46; 12-29-59; 8-30-60; 3-4-61; 12-27-61	
46	Appellant	2-13-63	258.21	8-13-63	9-4-59; 10-10-61; 12-27-62	
46	Fong Poy	2-13-63	4,090.17	²	3-15-47; 9-4-59; 12-29-60; 8-30-60; 3-24-61; 2-19-62; 3-19-62; 12-27-62	

²More than six months elapsed without the claim being allowed or disallowed prior to the institution of this action.

Within the time provided in Section 3772 of the Internal Revenue Code of 1939, on May 5, 1964, the appellant brought this action in the District Court for recovery of the amounts paid. (R. 1-12.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346(a)(1). The judgment of the District Court was entered on August 13, 1965. (R. 48.) Within sixty days thereafter, on September 13, 1965, a notice of appeal was filed. (R. 49.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether, under the Internal Revenue Code of 1939, delinquency interest is payable upon that portion of a jeopardy assessment representing interest upon the tax deficiency, from the date of notice of the jeopardy assessment to the date of payment of the assessed deficiency interest, notwithstanding a review and re-determination of the assessed tax deficiency by the Tax Court.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra*.

STATEMENT

The facts as stipulated by counsel (R. 39-45) and adopted by the District Court in its findings of fact (R. 47) may be stated as follows:

On August 31, 1951, the Commissioner of Internal Revenue caused joint and individual jeopardy assessments to be made against Fong Poy and the appellant, who were then husband and wife, with respect to determined deficiencies in federal income taxes, together with interest and penalties, for the taxable years and in the amounts set forth in the following schedule (R. 40-41):

<u>Taxable Year</u>	<u>Taxpayer</u>	<u>Tax Deficiency</u>	<u>Interest on Deficiency</u>	<u>Penalty [Sec. 293(b), I.R.C. of 1939]</u>	<u>Tot Assess</u>
1939	Fong Poy and Appellant	\$ 17,114.50	\$ 11,768.45	\$ 8,557.25	\$ 37,44
1940	Fong Poy and Appellant	11,998.67	7,530.73	5,999.34	25,52
1941	Fong Poy and Appellant	7,652.39	4,343.73	3,826.20	15,82
1942	Fong Poy	41,991.93	21,316.37	20,995.97	84,30
1943	Appellant	1,628.07	728.77	None	2,35
1943	Fong Poy	26,202.67	11,729.10	13,101.34	51,03
1944	Fong Poy	169,252.92	65,607.53	84,626.46	319,48
1944	Appellant	8,235.07	3,192.16	None	11,42
1945	Fong Poy	79,188.11	25,944.41	39,594.06	144,72
1946	Appellant	2,009.96	537.93	None	2,54
1946	Fong Poy	83,707.81	22,402.73	41,853.91	147,96

On September 4, 1951, notice and demand for payment of the jeopardy assessments were served upon

the appellant and Fong Poy. No bond to stay collection of the jeopardy assessments was ever filed by or on behalf of either the appellant or Fong Poy. (R. 41.)

The appellant and Fong Poy, after September 4, 1951, jointly and individually filed timely petitions with the Tax Court seeking redeterminations of the assessed deficiencies determined by the Commissioner. During the period in which their petitions were pending in the Tax Court, the appellant and Fong Poy were divorced by a final court decree entered on March 11, 1959, whereunder the appellant was awarded all the community real property subject to any unpaid income tax liabilities of the appellant and Fong Poy for the years 1931 through 1946, inclusive, including the above-described jeopardy assessments. No payments were made on these assessments by Fong Poy or the appellant during their marriage. Thereafter, from time to time, the appellant made payments of substantial sums for application upon the jeopardy assessment accounts. (R. 41-42.)

On January 9 and 10, 1961, final decisions were entered by the Tax Court, pursuant to stipulations entered into between counsel in those proceedings, redetermining the tax deficiencies and penalties which had been assessed on August 31, 1951. (R. 42.) The deficiencies and penalties for each of the taxable years involved as finally redetermined by the Tax Court were as follows (R. 43):

<u>Taxable Year</u>	<u>Taxpayer</u>	<u>Tax Deficiency</u>	<u>Penalty [Sec. 293(b), I.R.C. of 1939]</u>
1939	Fong Poy and Appellant	\$ 5,204.00	\$ 2,602.00
1940	Fong Poy and Appellant	10,898.67	5,449.34
1941	Fong Poy and Appellant	6,452.39	3,226.20
1942	Fong Poy	41,065.43	20,489.11
1943	Appellant	46,866.36	None
1943	Fong Poy	32,909.38	16,476.49
1944	Fong Poy	30,552.97	15,276.49
1944	Appellant	31,902.31	None
1945	Fong Poy	33,579.48	16,789.75
1946	Appellant	39,963.24	None
1946	Fong Poy	31,893.48	15,919.74

The Tax Court made no decision as to the amount of interest assessable and payable upon the redetermined tax deficiencies and penalties. (R. 43.)

After the entry of the Tax Court decisions, the accounts created at the time of the jeopardy assessments were adjusted pursuant to the Tax Court's redeterminations. Interest which was assessable on the tax deficiencies as finally redetermined by the Tax Court was recomputed from the date the tax was originally due to be paid to August 31, 1951, the date of the jeopardy assessments. Interest was then computed upon the redetermined jeopardy assessments, which interest was computed as accruing from September 4, 1951 (the date notice and demand for payment were given with respect to the jeopardy assessments), to the dates payments were credited against the assessed

balances in each account. For example, with respect to those portions of the redetermined jeopardy assessments which represented assessed interest on the tax deficiencies, interest was computed to accrue from the date of notice and demand for payment to the dates on which credits were made to satisfy in full such portion of each assessment representing assessed deficiency interest. Thus, delinquency interest was charged and collected from the appellant upon the deficiency interest which comprised a part of the redetermined jeopardy assessments. (R. 43-44.)

The appellant filed claims for refund for amounts paid by her for the delinquency interest charged and paid with respect to the assessed deficiency interest. These claims were disallowed, and this action was commenced in the District Court. (R. 44.) The District Court concluded (R. 47) that all interest charged and collected by the Government from the appellant was properly and legally charged and collected. Judgment was entered dismissing the appellant's complaint with prejudice. (R. 48.)

SUMMARY OF ARGUMENT

Pursuant to Sections 273 and 292(a) of the Internal Revenue Code of 1939, jeopardy assessments, which included interest to date on the tax deficiencies assessed, were made against the appellant. The appellant posted no bond to stay collection of the assessed amounts, and did not pay these amounts within ten days from the date of notice and demand for payment. Section 294(b) provides that "Where a de-

iciency, or any interest or additional amounts assessed in connection therewith * * *, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid." Pursuant to Section 294(b), the appellant was charged with delinquency interest on the assessed amounts (including the deficiency interest) from the date of the notice and demand for payment until the assessed amounts were paid. The District Court's conclusion that delinquency interest was properly charged and collected with respect to the assessed deficiency interest, notwithstanding that the delinquency interest was charged for the period while petitions for redeterminations of the assessed deficiencies were pending in the Tax Court, is in accord with the statute and the controlling decisions.

The appellant's arguments directed at Section 297 of the 1939 Code are inapplicable to the instant case, since that section applies only in jeopardy assessment cases where a bond has been filed to stay collection of the assessed amounts. Furthermore, even if Section 297 were applicable under the facts of the instant case, the appellant would have been liable for delinquency interest on the assessed deficiency interest in the amount in issue.

ARGUMENT

THE INTERNAL REVENUE CODE OF 1939 REQUIRES THE COLLECTION OF DELINQUENCY INTEREST UPON INTEREST ASSESSED AS A PART OF A JEOPARDY ASSESSMENT WHERE SUCH ASSESSMENT IS NOT PAID WITHIN TEN DAYS AFTER NOTICE AND DEMAND, IRRESPECTIVE OF TAX COURT REVIEW OF THE UNDERLYING TAX DEFICIENCIES

A. Introduction

This litigation presents the question whether the Government was correct under the Internal Revenue Code of 1939 in collecting what is commonly referred to as “delinquency interest” upon “deficiency interest”—the deficiency interest having been assessed under jeopardy assessment procedures together with the tax deficiencies (and ultimately adjusted in conformance with the Tax Court’s redeterminations of the tax deficiencies), and the delinquency interest having been computed and collected on the adjusted deficiency interest for the period from the date of notice and demand for payment of the jeopardy assessments to the dates on which payments satisfying the assessed deficiency interest were made. The appellant, while recognizing that delinquency interest may be collected with respect to assessed deficiency interest in certain circumstances, contends (Br. 10) that the collection of delinquency interest upon deficiency interest, for the period during which petitions for redeterminations of the assessed deficiencies were pending in the Tax Court, was erroneous. She suggests (Br. 15) that it may even have been unconstitutional. We submit that the imposition and collection of delinquency interest

upon assessed deficiency interest in jeopardy cases under the 1939 Code, irrespective of Tax Court review of the underlying tax deficiencies, is a legal and constitutional statutory exaction under the interest provisions of that statute as enacted by Congress and as interpreted by the courts where (as here) payment is not made within ten days from the notice and demand for payment of the jeopardy assessments. Indeed, this case is not distinguishable in any material aspect from *Ginsburg v. United States*, 278 F. 2d 470 (C.A. 1st), rehearing denied, 278 F. 2d 473, certiorari denied, 364 U.S. 878, where essentially the same arguments as are made by the appellant here were rejected.

The issue in the instant case cannot arise with respect to years governed by the Internal Revenue Code of 1954, as Section 6601(f)(2) (26 U.S.C. 1958 ed., Sec. 6601) specifically bars the collection of interest on interest. In commenting on Section 6601(f)(2) prior to the passage of the 1954 Code, both the House and Senate Committees used the following identical language in stating what the law was under the 1939 Code (H. Rep. No. 1337, 83d Cong., 2d Sess., p. A417 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4565); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 589 (3 U.S.C. Cong. & Adm. News (1954) 4621, 5238)):

Under the provisions of this section, there is no interest on interest. Under existing law, in the case of deficiencies in income, estate or gift taxes, interest runs from the date prescribed for payment of the tax to the date of assessment of the deficiency and then interest on the amount assessed runs from the date of assessment.

There is no question in this case (as the appellant recognizes (Br. 4)) that the applicable statute is the Internal Revenue Code of 1939, the liabilities in question having arisen during years governed by that Code. See Internal Revenue Code of 1954, Sec. 7851 (a)(6) and (b)(1) (26 U.S.C. 1958 ed., Sec. 7851); *Ginsburg v. United States*, *supra*; *Ingannamorte v. United States*, 189 F. Supp. 341 (N.J.); Rev. Rul. 54-426, 1954-2 Cum. Bull. 39.

B. If a taxpayer fails to post a bond to stay collection of a jeopardy assessment, Section 294(b) of the 1939 Code authorizes the collection of delinquency interest on assessed deficiency interest irrespective of Tax Court review of the underlying tax deficiency, where the assessed deficiency interest is not paid within ten days from the giving of notice and demand for payment

Section 273(a) of the Internal Revenue Code of 1939,³ Appendix, *infra*, authorizes the Commissioner to make a jeopardy assessment if he believes that delay will seriously hamper collection of a deficiency determined by him.⁴ This section requires him to "im-

³Hereinafter, references to the Internal Revenue Code are to the 1939 Code, unless otherwise specified.

⁴No claim is or can be made by the appellant that the Commissioner abused his statutory authority in making the jeopardy assessments on which the interest in question was computed. The appellant recognizes (Br. 7) that the Commissioner's belief that there is a clear and present danger that a deficiency will be jeopardized by delay is not subject to judicial review. *Field v. United States*, 263 F. 2d 758 (C.A. 5th); *Lloyd v. Patterson*, 242 F. 2d 742 (C.A. 5th); *Veeder v. Commissioner*, 36 F. 2d 342 (C.A. 7th); *Foundation Co. v. United States*, 15 F. Supp. 229 (Ct. Cl.). The jeopardy assessment is in fact used primarily in cases in which fraud has been determined to be an element of the tax deficiency, as in the instant case. The procedures followed within the Internal Revenue Service in each case require a thorough review of the determination of jeopardy before a jeopardy assessment is made. See Rev. Proc. 60-4, 1960-1 Cum. Bull. 877.

mediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law)." See Section 292(a), Appendix, *infra*. If the taxpayer wishes to stay the immediate collection of the amount of the assessment pending final redetermination by the Tax Court of the actual amount owing, Section 273(f), Appendix, *infra*, requires him to file a bond. In the instant case, the Commissioner made joint and individual jeopardy assessments against the appellant and Fong Poy, her former husband. The jeopardy assessments were composed of (1) the basic tax deficiencies, (2) interest on the tax deficiencies, and (3) fraud penalties. No bond was posted to stay collection of the assessed amounts.

Section 294(b), Appendix, *infra*, provides that "Where a deficiency, or any interest or additional amounts assessed in connection therewith * * *, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid." The delinquency interest on the assessed deficiency interest in issue in the instant case was imposed pursuant to this provision, as the assessed deficiency interest was not paid within ten days from the date of notice and demand for payment. The fact that the appellant and Fong Poy filed petitions with the Tax Court seeking redeterminations of the assessed deficiencies (as provided in Section 272(a)(1), Appendix, *infra*) did not

alter the right of the Government to be paid interest upon the assessed amounts under Section 294(b). In this connection, it is to be noted that the interest provided for in Section 294(b) is not a penalty, as the appellant regards it, but is compensation for the use of money exacted because of delay in payment of tax. See *Manning v. Seeley Tube & Box Co.*, 338 U.S. 561; *United States v. Childs*, 266 U.S. 304; *Hastings & Co. v. Smith*, 224 F. 2d 875 (C.A. 3d); *Owens v. Commissioner*, 125 F. 2d 210 (C.A. 10th), certiorari denied, 316 U.S. 704, rehearing denied, 317 U.S. 704; Rev. Rul. 55-22, 1955-1 Cum. Bull. 198.

The leading decision on the precise issue involved in the present case was rendered in 1960 by the Court of Appeals for the First Circuit in *Ginsburg v. United States*, *supra*. The taxpayer had filed no bond after jeopardy assessments were made against him, had petitioned for Tax Court review, and then later complained in the District Court that delinquency interest on deficiency interest had been collected from him for the period from the date of notice of the jeopardy assessments to the date of payment, notwithstanding Tax Court review. The First Circuit held (as we contend here) that delinquency interest on deficiency interest was correctly imposed under the 1939 Code in the no-bond jeopardy case by virtue of Section 294(b). The court considered and rejected the taxpayer's argument that the imposition of such compounded interest in jeopardy cases was discriminatory and amounted to a penalty. Accord, *Erickson v. United States*, 309 F. 2d 760 (Ct. Cl.); *Silver v. United*

States, 202 F. Supp. 1 (N.D. N.Y.); *United States v. Miyamoto* (Hawaii), decided March 11, 1960 (60-1 U.S.T.C., par. 9366); *Grimsley v. Patterson*, 183 F. Supp. 729 (N.D. Ala.); *Symonides v. Crenshaw* (E.D. Va.), decided October 27, 1953 (53-2 U.S.T.C., par. 9639); 10 Mertens, Law of Federal Income Taxation (Zimet Rev.), Sec. 55.07. Contra, *Crolich v. United States*, 144 F. Supp. 109 (S.D. Ala.)

To be sure, as appellant contends (Br. 5), had there been no jeopardy assessments in this case, then the tax deficiencies, fraud penalties and interest on the tax deficiencies would have been assessed after the Tax Court decisions had become final. Section 272(a)(1). If these amounts had been assessed at that time, and if the amounts had not been paid within ten days from the date of notice of the assessments, then delinquency interest would have accrued on the unpaid amounts of the assessments (including the assessed deficiency interest) from the date of notice until the amounts had been paid in full. Section 294(b). Since the assessments would have been made subsequent to the Tax Court redeterminations of the deficiencies, delinquency interest would not have been imposed on deficiency interest during the pendency of the Tax Court litigation.

In the instant case, however, because the jeopardy assessments preceded the Tax Court litigation, imposition of delinquency interest upon assessed deficiency interest during the pendency of the Tax Court litigation was required by Section 294(b), since the deficiency interest was not paid within ten days from

the notice and demand for payment. As stated by the First Circuit in *Ginsburg v. United States, supra*, p. 473:

It having been properly determined that payment is to be made, the imposition of "delinquency" interest thereafter on the total amount assessed is a normal consequence of non-payment, and one that is uniformly applied throughout the statute. There being no valid objection to the dog, there can be none to the fact that like all others, he has a tail.

The appellant contends (Br. 9-10) that Section 297, Appendix, *infra*, not Section 294(b), should govern the imposition of interest after a jeopardy assessment, where the taxpayer (as in the instant case) files a petition for redetermination of the assessed deficiency with the Tax Court. She states (Br. 10) that the interest in issue herein would not have been authorized by Section 297. It is our position (1) that Section 297 is inapplicable under the facts of the instant case because no bond was filed to stay collection of the jeopardy assessment, and (2) that the appellant would have been liable for delinquency interest on the assessed deficiency interest in the amount in issue herein even if Section 297 were applicable under the facts of the instant case.

As noted above, Section 273(f) requires a taxpayer who wishes to stay the immediate collection of the amount of a jeopardy assessment to file a bond pending final determination by the Tax Court of the actual amount owing. If a bond is filed, then to the

extent the assessment is sustained by the Tax Court (See Section 273(i), Appendix, *infra*), Section 297 requires the collection of interest upon the amount thus stayed by the bond, as a part of the tax, from the date of notice of the jeopardy assessment to the date of notice and demand following the decision of the Tax Court, and failing payment within ten days, further interest as a part of the tax upon the unpaid amount until paid. Section 297 says nothing with respect to a case, such as the instant one, where the taxpayer has failed to file a bond. Thus, Congress felt that there was no need to cover such situations in Section 297, since they are covered by the similar provisions of Section 294(b), which deals with interest generally upon unpaid amounts. This is evident from the provisions of Section 294(c), Appendix, *infra*, in which Congress explicitly excluded from the coverage of Section 294(b) the situation where a taxpayer failed to pay the jeopardy assessment because he had filed a bond. In such a situation, Congress provided that Section 294(b) "shall not apply to the amount covered by the bond," leaving the clear inference (as the District Court held) that Section 294(b) does apply to amounts in excess of or amounts not covered by a bond.

The appellant relies on the case of *Crolich v. United States*, *supra*. However, the decision in *Crolich* has never been followed in any other reported case and has been considered and criticized by other courts in which it has been cited. See *Ginsburg v. United States*, *supra*; *Silver v. United States*, *supra*; *Grims-*

ley v. Patterson, supra. In *Grimsley*, the District Court for the Northern District of Alabama, considering a no-bond jeopardy case with facts similar to those in *Crolich* only a year after the *Crolich* decision had been rendered in the Southern District of Alabama, cited its sister court as being in error on the applicable provisions of the Code.

Even if the appellant were correct in contending that Section 297 and not Section 294(b) should govern the matter of interest collectible in connection with a jeopardy assessment where no bond has been filed and the taxpayer petitions the Tax Court for a redetermination of the assessed deficiency, the delinquency interest collected on the assessed deficiency interest in issue herein would still have been properly charged to the appellant. The interest to be collected pursuant to Section 297 is based upon the amount redetermined by the Tax Court as the amount of the deficiency which should have been assessed, which amount is collected pursuant to Section 273(i). See also Section 273(f). The appellant emphasizes (Br. 10) that this amount redetermined by the Tax Court does not include interest as the Tax Court never redetermines interest in fixing the amount of the deficiency. She states that upon the amount fixed by the Tax Court (which cannot include deficiency interest), interest is collected from the date of the jeopardy notice and demand to the date of notice and demand after the redetermination by the Tax Court has become final, and that Section 297 provides that additional interest on these amounts may be collected

only from the date of notice and demand after the Tax Court's decision has become final. She concludes from this that Section 297 does not authorize any compounding of interest prior to the notice and demand which follows the Tax Court's decision, and that, therefore, delinquency interest on deficiency interest in jeopardy cases (where a petition is filed in the Tax Court) commences at the same point in time as in ordinary assessment cases, that is, after the Tax Court's decision has become final and notice and demand for payment have been issued.

The appellant's argument is based on the erroneous premise that the Tax Court has no jurisdiction to redetermine interest assessable in a jeopardy assessment case. In support of this allegation, the appellant relies on the following cases (Br. 8-9): *Commissioner v. Kilpatrick's Estate*, 140 F. 2d 887 (C.A. 6th); *United States v. Globe Indemnity Co.*, 94 F. 2d 576 (C.A. 2d); and *Fuller v. Commissioner*, 20 T.C. 308. Neither *Kilpatrick's Estate* nor *Globe Indemnity* involved jeopardy assessments. We do not suggest that the Tax Court has jurisdiction to redetermine interest questions in non-jeopardy cases. Until the deficiency is assessed, there can of course be no determination and assessment of interest (see Section 292(a)), and since in non-jeopardy cases the deficiency assessment cannot be made prior to the Tax Court's decision becoming final, in such cases the subject of interest is not a proper one for redetermination by the Tax Court. See *Commissioner v. Kilpatrick's Estate*, *supra*, p. 888. However, where, as

here, the Tax Court proceedings follow a jeopardy assessment, in accordance with Section 273(a), interest on the tax deficiency has already been assessed, and Section 273(c), Appendix, *infra*, provides that "the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith." The cases clearly hold that a redetermination with respect to interest may be made by the Tax Court where review by the Tax Court follows a jeopardy assessment. See *Ginsburg v. United States*, *supra*; *Signal Gasoline Corp. v. United States*, 46 F. Supp. 276 (S.D. Calif.); *Riss & Co. v. Commissioner*, 45 T.C. No. 21.⁵ See also 10 Mertens, Law of Federal Income Taxation, *supra*, Sec. 55.03. Contra, *Crolich v. United States*, *supra*.

As the First Circuit stated in *Ginsburg v. United States*, *supra*, p. 473:

Appellants do suggest, however, that "the amount which should have been assessed" (section 273(i)) is limited to the deficiency because, they claim, the Tax Court has no jurisdiction over interest. This may well be true with regard to

⁵In the *Riss* case, the Tax Court distinguished its decision in *Fuller v. Commissioner*, *supra*, as follows:

In *G. E. Fuller*, 20 T.C. 308 (1953), the deficiencies and interest had been assessed prior to the filing of our opinion therein, presumably under the jeopardy provisions. Although we held (at page 318) that we had no jurisdiction over a question concerning interest, it does not appear that our attention had been directed to Section 273(c) of the 1939 Code. Indeed, as we stated in our opinion, the question of interest was not discussed on brief. Thus, we do not deem our decision in that case to be controlling on the question of jurisdiction.

deficiencies determined and assessed in the normal manner under section 272. See *Commissioner of Internal Revenue v. Kilpatrick's Estate*, 6 Cir. 1944, 140 F. 2d 887. But section 273(c), dealing with jeopardy assessments, specifically provides that "the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency *and of all amounts assessed at the same time in connection therewith.*" (Italics supplied.) This is to be compared with the more limited language of section 272(e), applicable to normal deficiency proceedings. Also compare section 273(i), "Collection of unpaid amounts," with section 272(b), "Collection of deficiency found by Tax Court," which further points up the distinction between jeopardy-assessment procedure and normal deficiency procedure.

Once it is recognized, as the cases hold, that the Tax Court may redetermine interest in jeopardy assessment cases, it can readily be seen that the amount fixed by the Tax Court, upon which interest is to be calculated pursuant to Section 297, includes deficiency interest from the date the tax was originally due to be paid until the date of the redetermined jeopardy assessment, and thus, the interest imposed on this amount, from the date of the jeopardy notice and demand to the date of notice and demand following the decision of the Tax Court, results in a compounding of interest like the result which is obtained under Section 294(b). See *Ginsburg v. United States*, *supra*; *Signal Gasoline Corp. v. United States*, *supra*. See also 10 Mertens, *Law of Federal Income Taxation*, *supra*, Sec. 55.07.

CONCLUSION

The judgment of the District Court is correct and should be affirmed.⁶

Respectfully submitted,

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June, 1966.

⁶It was agreed by the parties that the arithmetical computations of the amounts of accrued interest on assessed deficiency interest paid by the appellant to be refundable for each account involved in this action, together with the dates of such payments and the interest thereon which the appellant also claims to be refundable, would be determined, verified and settled by and between counsel if required under the decision of the District Court. In the event that counsel could not agree upon such computations, the amounts were to be settled by the District Court upon application and ten days notice. (R. 45.) Therefore, should this Court disagree with the holding of the District Court, then this case should be remanded to that court so that the computations may be made.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN M. YOUNGQUIST,
Assistant United States Attorney.

(Appendix Follows)

Appendix.



Appendix

INTERNAL REVENUE CODE OF 1939

Sec. 272 [As amended by Sec. 203(a), Act of December 29, 1945, c. 652, 59 Stat. 669]. Procedure In General.

(a)(1) *Petition to The Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

(2) *Cross references.*—For exceptions to the restrictions imposed by this subsection, see—Subsection

(d) of this section, relating to waivers by the taxpayer;

Subsection (f) of this section, relating to notifications of mathematical errors appearing upon the face of the return;

Section 273, relating to jeopardy assessments;

Section 274 relating to bankruptcy and receiverships; and

Section 1145, relating to assessment or collection of the amount of the deficiency determined by the Tax Court pending court review.

* * * *

(26 U.S.C. 1952 ed., Sec. 272.)

Sec. 273. Jeopardy Assessments.

(a) *Authority for Making.*—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) *Deficiency Letters.*—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment.

(c) *Amount Assessable before Decision of Tax Court.*—The jeopardy assessment may be made in re-

spect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of section 272(f) prohibiting the determination of additional deficiencies, and whether or not the taxpayer has theretofore filed a petition with The Tax Court of the United States. The Commissioner may, at any time before the decision of the Tax Court is rendered, abate such assessment, or any unpaid portion thereof, to the extent that he believes the assessment to be excessive in amount. The Commissioner shall notify the Tax Court of the amount of such assessment, or abatement, if the petition is filed with the Tax Court before the making of the assessment or is subsequently filed, and the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

*

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(f) *Bond to Stay Collection.*—When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Tax Court which has become final, together with interest thereon as provided in section

297. If any portion of the jeopardy assessment is abated by the Commissioner before the decision of the Tax Court is rendered, the bond shall, at the request of the taxpayer, be proportionately reduced.

(g) *Same—Further Conditions.*—If the bond is given before the taxpayer has filed his petition with the Tax Court under section 272(a), the bond shall contain a further condition that if a petition is not filed within the period provided in such subsection, then the amount the collection of which is stayed by the bond will be paid on notice and demand at any time after the expiration of such period, together with interest thereon at the rate of 6 per centum per annum from the date of the jeopardy notice and demand to the date of notice and demand under this subsection.

* * * *

(i) *Collection of Unpaid Amounts.*—When the petition has been filed with the Tax Court and when the amount which should have been assessed has been determined by a decision of the Tax Court which has become final, then any unpaid portion, the collection of which has been stayed by the bond, shall be collected as part of the tax upon notice and demand from the collector, and any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 322, without the filing of claim therefor. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed,

then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the collector.

* * * *

(26 U.S.C. 1952 ed., Sec. 273.)

Sec. 292 [As amended by Sec. 2, Act of December 17, 1943, c. 346, 57 Stat. 601, and Sec. 14(c), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231]. Interest On Deficiencies.

(a) *General Rule.*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion.

* * * *

(26 U.S.C. 1952 ed., Sec. 292.)

Sec. 293. Additions To The Tax In Case Of Deficiency.

(a) *Negligence*.—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of section 272 (i), relating to the prorating of a deficiency, and of section 292, relating to interest on deficiencies, shall not be applicable.

(b) *Fraud*.—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d) (2).

(26 U.S.C. 1952 ed., Sec. 293.)

Sec. 294. Additions To The Tax In Case Of Non-payment.

* * * *

(b) *Deficiency*.—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and

demand until it is paid. If any part of a deficiency prorated to any unpaid installment under section 272(i) is not paid in full on or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

(c) *Filing of Jeopardy Bond.*—If a bond is filed, as provided in section 273, the provisions of subsection (b) of this section shall not apply to the amount covered by the bonds.

* * * *

(26 U.S.C. 1952 ed., Sec. 294.)

Sec. 297. Interest In Case Of Jeopardy Assessments.

In the case of the amount collected under section 273(i) there shall be collected at the same time as such amount, and as a part of the tax, interest at the rate of 6 per centum per annum upon such amount from the date of the jeopardy notice and demand to the date of notice and demand under section 273(i), or, in the case of the amount collected in excess of the amount of the jeopardy assessment, interest as provided in section 292. If the amount included in the notice and demand from the collector under section 273(i) is not paid in full within ten days after such notice and demand, then there shall be collected, as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid.

(26 U.S.C. 1952 ed., Sec. 297.)

FEB 14 1967

No. 20,619

United States Court of Appeals
For the Ninth Circuit

HELEN FONG, also known as Helen
Poy, also known as Fong Hong May,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from Judgment of the United States District Court
for the Northern District of California,
Southern Division

Honorable Fred M. Taylor, Judge for the District of Idaho,
Sitting by Special Assignment

APPELLANT'S REPLY BRIEF

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No. 20,619

United States Court of Appeals

For the Ninth Circuit

HELEN FONG, also known as Helen
Poy, also known as Fong Hong May,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from Judgment of the United States District Court
for the Northern District of California,
Southern Division

Honorable Fred M. Taylor, Judge for the District of Idaho,
Sitting by Special Assignment

APPELLANT'S REPLY BRIEF

The government's brief makes two arguments: (1) that Section 294(b) and not Section 297 states the applicable rule for the collection of interest where no bond is filed to stay collection of a jeopardy assessment; and (2) that in any event Section 297 authorizes the collection of interest on interest under the circumstances of this case. Neither argument is sound.

- A. SECTION 294(b) MAY AUTHORIZE COLLECTION OF INTEREST ON THE INTEREST INCLUDED IN A JEOPARDY ASSESSMENT WHERE NO BOND IS FILED TO STAY COLLECTION, BUT IF THAT ASSESSMENT DOES NOT BECOME FINAL, BUT IS REDETERMINED BY THE TAX COURT, THEN THE TAXPAYER'S ULTIMATE LIABILITY FOR INTEREST IS CONTROLLED BY SECTION 297.

As explained in appellant's opening brief, Section 297 (entitled "Interest in Case of Jeopardy Assessments") does not authorize the collection of compound interest for the period of time prior to the Tax Court decision redetermining a deficiency. The government, however, contends that Section 297 applies only to cases in which collection has been stayed by a bond and that Section 294(b) governs a case such as this where no bond was filed. But there is nothing in Section 297 which purports to limit its application to cases in which collection has been stayed by a bond. The government's brief argues that such a limitation must necessarily be implied from the language of Section 294(c) which expressly provides that Section 294(b) does not apply to amounts covered by a bond. (Appellee's Br., p. 16.) From this, the government infers that Section 294(b) *does* apply to amounts not covered by a bond. The government contends that Section 297 is thus superseded by Section 294(b) where no bond is filed; otherwise the sections would overlap.

There is, however, a better construction of these sections (App. Op. Br., pp. 12-14)—one which also eliminates any overlapping or inconsistency but which

at the same time avoids making the taxpayer's dollar liability for interest turn on such irrelevant factors as the inability to post a bond or the Commissioner's decision (not reviewable) to make a jeopardy assessment. Section 294(b) permits collection of interest on assessed amounts (which include interest to date) from the date of the notice and demand following the assessment (except where collection is stayed by a bond). Should the assessment become final because the taxpayer does not pursue his remedy in the Tax Court, then the result is the same for jeopardy and non-jeopardy cases whether or not a bond is filed. That is, interest on assessed interest begins after the notice and demand following the assessment. But if the assessment is redetermined by the Tax Court, Sections 297 and 273(i) become applicable. Section 297 deals solely and exclusively with "the amount collected under Section 273(i)." Section 273(i) applies only "... when the amount which should have been assessed has been determined by a decision of . . ." the Tax Court. In that case, Section 297 authorizes interest on assessed interest only during the period following the Tax Court decision. Any amount which had been collected while the case was pending in the Tax Court in excess of the amount which the Tax Court determined should have been assessed (which would include any interest which may have been collected pursuant to Section 294(b)) is required by Section 273(i) to be credited or refunded to the taxpayer. Again, the result is the same for jeopardy

and non-jeopardy cases, and whether or not a bond was filed.

In other words, the factor which determines whether Section 294(b) or 297 applies in a jeopardy case is whether or not the assessment is redetermined by the Tax Court, and not, as the government argues, whether or not a bond is filed.

Part of the difficulty in interpreting and reconciling these confusing sections of the 1939 Code undoubtedly stems from the apparent assumption of the draftsman that, in the case of a jeopardy assessment, the only amounts not immediately collected would be those amounts the collection of which had been stayed by the posting of a bond. Both Section 294(c) and the authorization in Section 273(i) for collection of any "unpaid portion, the collection of which has been stayed by the bond" seem to have been motivated by that philosophy. Yet Congress must have intended the same treatment respecting amounts unpaid because the Commissioner has not enforced payment as amounts unpaid because a bond was posted. Section 273(i) must apply equally to both or there is no statutory authority for collecting amounts which are not stayed by a bond, but which are nevertheless uncollected at the time of the decision in the Tax Court.

The government's contention that Section 294(b) applies where collection is not stayed by a bond, and Section 297 only when a bond is not filed, seems inescapably wrong. The taxpayer's ultimate liability for

interest following a Tax Court decision is governed by Section 297.

B. SECTION 297 PERMITS COLLECTION OF INTEREST ON INTEREST IN THE CASE OF A JEOPARDY ASSESSMENT ONLY AFTER REDETERMINATION OF THE DEFICIENCY IN THE TAX COURT.

The government next argues that even if Section 297 governs interest on jeopardy assessments where no stay bond has been posted, interest on interest is still collectible under that section. This contention too is invalid.

Both the government (Appellee's Br., p. 17) and the appellant (App. Op. Br., p. 10) agree that the interest to be collected pursuant to Section 297 is interest on the amount of the deficiency which should have been assessed as determined by the Tax Court. Whether or not it has jurisdiction to do so, the Tax Court does not and did not in this case determine the amount of interest which should have been assessed. This is nowhere more clearly shown than in the government's brief, where in its summary of the Tax Court decision the government says: "The Tax Court made no decision as to the amount of interest assessable. . . ." (Appellee's Br., p. 6.) Therefore, the interest provided for by Section 297 on the amount collected under Section 273(i) ("the amount which should have been assessed as determined by the Tax Court") is only interest on the amount of the deficiency and penalties. It cannot include interest on interest which was not determined by the Tax Court

to have been an amount which should have been assessed.*

The government argues that the Tax Court *does* have jurisdiction to determine the amount of interest which should have been assessed (citing *Riss v. Commissioner*, 45 T.C. No. 21, a recent Tax Court case which relies on the *Ginsburg* case) and that, therefore, “. . . the amount fixed by the Tax Court, upon which interest is to be calculated pursuant to Section 297, includes deficiency interest . . . and thus, the interest imposed on this amount, . . . results in a compounding of interest like the result which is obtained under Section 294(b).” (Appellee’s Br., p. 20.) This statement plainly involves a non sequitur. It does not follow from the existence of jurisdiction to determine interest that “the amount fixed by the Tax Court . . . includes deficiency interest.” In fact, the Tax Court decision did *not* include interest.

*The Tax Court decision in this case resulted from a compromise settlement made pursuant to stipulation between appellant’s counsel and the government. (R. 42:18-24.) During negotiations leading to this settlement, appellant’s counsel offered to include the precise question of interest on interest now being litigated, and would have preferred to settle this question along with the amount of tax and penalty due. However, the government’s counsel took the position that this was impossible because the Tax Court would not accept jurisdiction of any question involving interest, and had repeatedly so held. (See cases cited in Appellant’s Opening Brief, pp. 8-9.) Accordingly, the case was settled without any interest determination. That the Tax Court now appears to have reversed itself on this question (*Riss & Company, Inc. v. Commissioner*, 45 T.C. 21 (Dec. 1965), cited at page 19 of the Appellee’s Brief), can have no bearing on *this* case, because it is very clear that in this case the Tax Court did *not* include interest in its decision. Indeed, so far as we know, the *Riss* case is the first case in which the Tax Court has ever undertaken to determine an interest question.

Contrary to the government's brief, appellant's position does not depend upon the Tax Court's lack of *jurisdiction* to determine interest, but rather on its failure to exercise jurisdiction for whatever reason.

The appellant's position is further supported by the fact that under the government's construction of Section 297, there would be a double compounding of interest. Section 297 provides that:

. . . in the case of the amount collected under §273(i) [the amount which the Tax Court determined should have been assessed] there shall be collected . . . interest . . . upon such amount from the date of the jeopardy notice and demand to the date of the notice and demand under §273(i) [after judgment in the Tax Court].

Section 297 further provides:

If the amounts included in the notice and demand from the collector under 273(i) [which includes the interest provided for above] is not paid in full within ten days after such notice and demand, then there shall be collected . . . interest on the unpaid amount [which includes the interest provided for above] from the date of the notice and demand until it is paid.

If, as the government contends, interest is included in "the amount collected under Section 273 (i)" the language first above quoted imposes interest on interest from the time of the jeopardy assessment to the decision in the Tax Court. The language quoted last above then imposes interest on interest on interest, or double compound interest, after that time. The

government does not contend that it can exact doubly compounded interest, but that is the logical result of its position here. On the other hand, if as appellant contends, the amount "collected under Section 273 (i)" does not include interest, the result is symmetrical with that in the case of non-jeopardy assessments where interest on interest does not begin until after decision in the Tax Court.

C. TO SUSTAIN THE GOVERNMENT'S INTERPRETATION OF SECTION 297 WOULD RESULT IN THE DENIAL OF DUE PROCESS OF LAW TO APPELLANT.

The government argues (Appellee's Br., pp. 12-13) that interest on interest is not to be regarded as a penalty, but as compensation for the use of money because of delay in payment of tax. Appellant concedes that the government is entitled to compensation for delay in the payment of any deficiency, and to compensation for delay in the payment of interest thereon, *after* judgment in the Tax Court, when the assessment becomes final. What appellant contests is the government's assertion that it can exact an additional sum of interest merely by making a jeopardy assessment, when admittedly the decision to make a jeopardy assessment lies in the commissioner's unreviewable discretion. It is appellant's contention that to allow the commissioner to impose such additional interest by his unreviewable decision to make a jeopardy assessment is to deprive appellant of property without due process of law in violation of the Fifth Amendment of the United States Constitution.

The cases cited by the government (Appellee's Br., p. 13) to the effect that interest on delayed tax payments is not a penalty are not in point. They speak to the validity of interest on a deficiency, which appellant concedes, and not to the validity of the additional unreviewable imposition of interest on interest.

CONCLUSION

Appellant has shown that the complicated and confusing statutory provisions here involved can be interpreted and applied in a sensible and logical way that will avoid the harsh, inequitable, and probably unconstitutional result that was reached in the District Court. That court's judgment should be reversed.

Dated, Oakland, California,

July 11, 1966.

Respectfully submitted,

STARK & CHAMPLIN,

By JOHN F. WELLS,

Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN F. WELLS,

Attorney for Appellant.

FEB 14 1967

No. 20620

In the
United States Court of Appeals
For the Ninth Circuit

HARLOW H. OBERBILLIG, as administrator
of the Estate of J. J. Oberbillig,

Appellant,

vs.

BRADLEY MINING COMPANY,

Appellees.

BRIEF OF APPELLANT

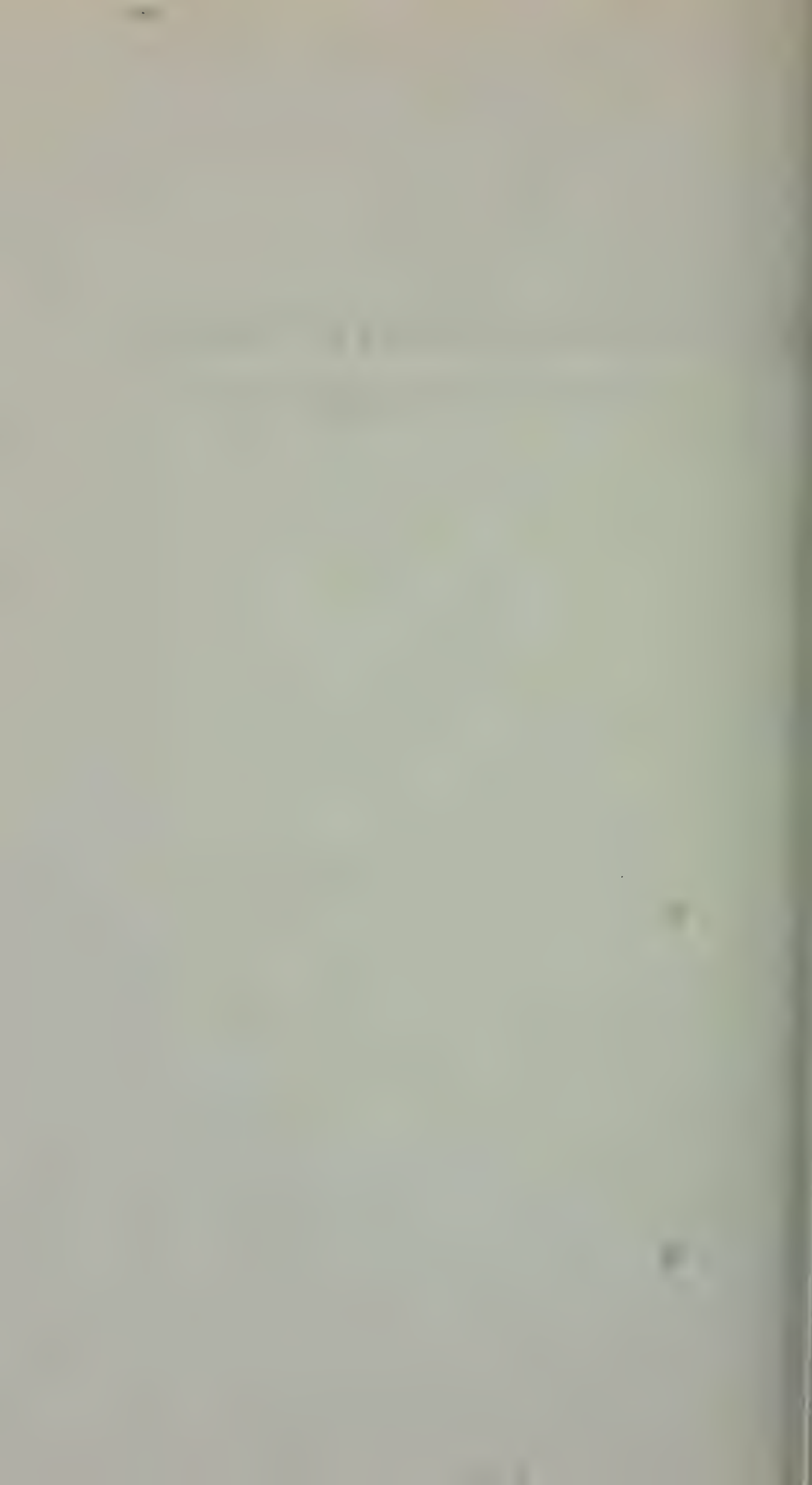
*On Appeal from the District Court of the
United States for the District of Idaho,
Southern Division*

FILED

MAR 15 1966

WILLIAM B. LUCK, CLERK

CLEMONS, SKILES & GREEN
Counsel for Appellant
Res: Boise, Idaho



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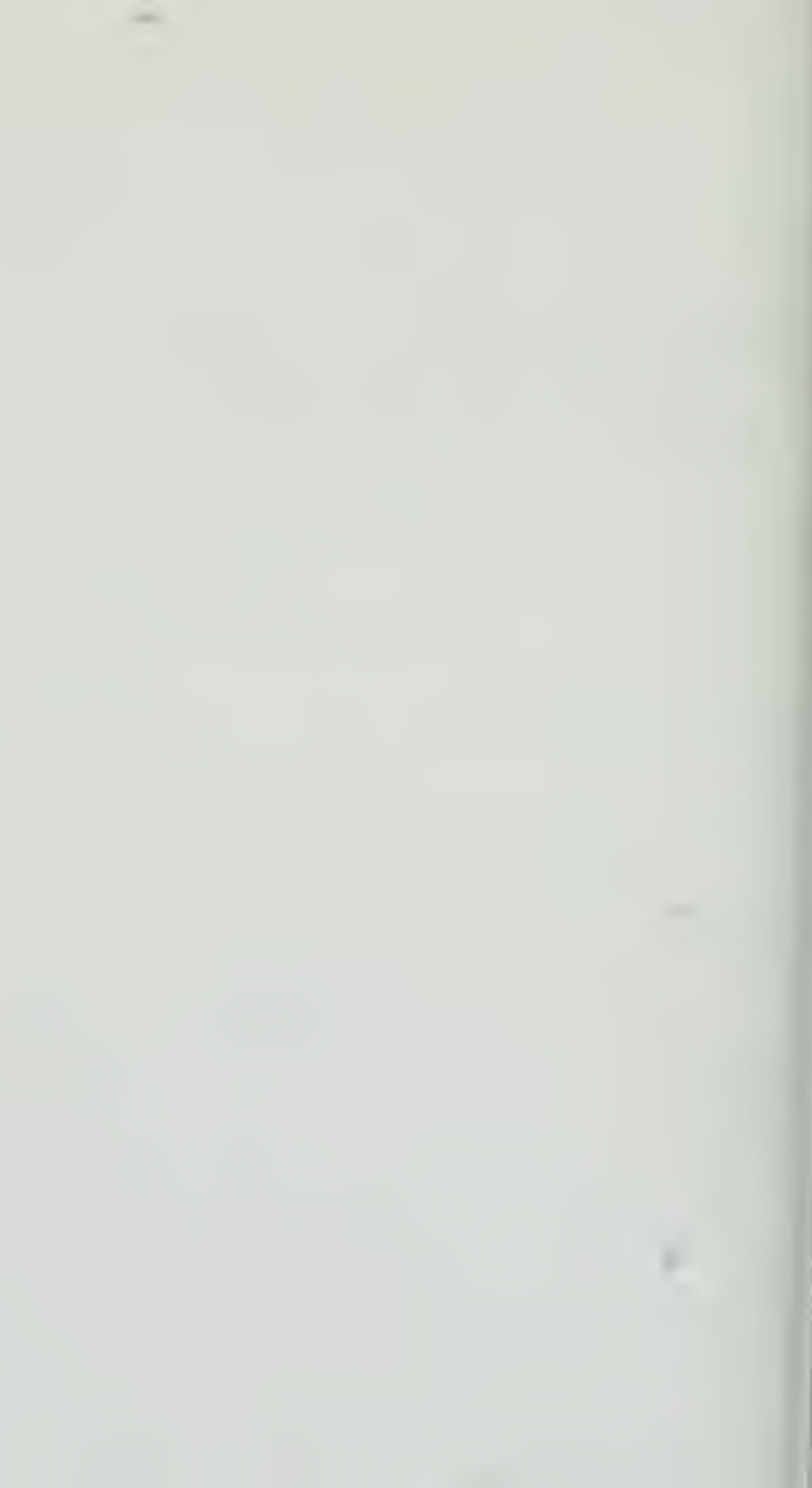


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**In the
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vs.

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Appellees.

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.-C.A. 1332, diversity of citizenship, plaintiff being a resident and citizen of Idaho (T.R. 35-36 and 50), defendant being a California corporation (T.R. 36 and 50), and the amount in controversy, exclusive of interest and costs, exceeding \$10,000.00 (T.R. 6 and 50).

This court has jurisdiction to hear the appeal under 28 U.S.C.A. 1291 and 2107 and Federal Rules of Civil Procedure, Rule No. 73.

STATEMENT OF THE CASE

Under date of December 31, 1941, appellant's predecessor and the appellee entered into a contract entitled "Conveyance, Royalty Agreement and Option" (T.R. 8-23), under the terms of which it was agreed (T.R. 8) that "in consideration of the royalty hereinafter agreed to be paid by Bradley" the appellant did "grant, bargain, sell and assign, unto Bradley" (appellee) certain lode and placer mining claims situate in the Yellow Pine Mining District, Valley County, Idaho, together with certain easements of tailing ponds (T.R. 12) and water rights-of-way (T.R. 12-13), mill-sites, warehouses, etc.

The provisions of said agreement will be more specifically referred to under the argument in this brief.

Appellee entered upon the mining properties and explored and mined the same from 1941 until July, 1952 (T.R. 38) extracting therefrom gold, silver, antimony and tungsten metals (T.R. 41). The mining claims in question have a proven mineral deposit, there having been concentrate shipments of minerals from the Yellow Pine Mine at Stibnite from 1932 (this date preceding the date of the contract between the parties to this action) to 1952, 9.5 million in gold value, 1.1 million in silver value, 9.6 million in antimony value and 17.8 million in tungsten value, produced from 4.7 million tons of ore (T.R. 41-42).

After July 26, 1952, the appellee discontinued mining and development operations upon the property (T.R. 38), although there was, and still are large quantities of ore of commercial value blocked out for milling and mining purposes (T.R. 38).

Appellee also operated a mine known as Ima Tung-

sten Mine which was located in eastern Idaho (T.R. 42), which mine was not a part of the properties conveyed by appellant. After the stoppage of development and mining operations in the Yellow Pine area, many of the Yellow Pine facilities were used in support of the Ima Mine operation (T.R. 42).

After July 1952, appellee began to dismantle and remove facilities previously used in mining operation. In 1957 a general auction was held and thereafter over a period of several years all facilities such as dwelling houses, warehouses and smelter facilities were gradually removed (T.R. 43) over a period of several years the last of the production and housing facilities being removed in 1964 (T.R. 44).

In 1955 appellee reconveyed to appellant 211 unpatented claims in the Antimony Ridge Group. In 1957, appellee reconveyed to appellant 217 unpatented claims in the Midnight Group (T.R. 43). In 1960, appellee reconveyed 19 unpatented claims, and in 1963 reconveyed 18 unpatented claims to appellant (T.R. 43-44). At this point all claims requiring annual assessment work had been reconveyed to appellant, while appellee retained 26 patented claims originally set forth in the 1941 agreement and 4 or 5 claims patented subsequent to the 1941 agreement (T.R. 43). Within the exterior boundaries of the patented claims retained by appellee was included the Meadow Creek Mine, Hennessy pit mine, the mill, smelter, all warehouses and dwelling houses, airport landing strip and hangar (T.R. 43). By its reconveyances the appellant divested itself of all lands requiring expensive annual assessment work and retained approximately 600 acres of patented lands taxable at approximately \$200.00 per year (T.R. 44). In addition, appellant allowed certain water rights to terminate (T.R. 44).

The area retained by appellee amounts to or constitutes the heartland of the mining properties originally described in, and conveyed by, the 1941 agreement (T.R. 44).

This action was filed January 7, 1965, whereby appellant seeks judgment for damages in the amount of \$107,485.50 and for reconveyance of the patented claims to appellant which are still held by appellee (T.R. 6 and 39). Appellee filed a motion to dismiss, which was treated and heard as a motion for summary judgment (T.R. 46) upon the amended complaint (T. R. 35-40) and the affidavits of Eugene C. Thomas (T. R. 26-27) and Harlow H. Oberbillig (T.R. 41-44). The court entered its memorandum decision (T.R. 46-48) granting the summary judgment and entered findings, conclusions (T.R. 49-54) and judgment (T.R. 55-56) thereon.

SPECIFICATIONS OF ERROR

Appellant claims the court erred:

1. In allowing and granting appellee's motion to dismiss.
2. In allowing and granting appellee's motion to dismiss and granting a summary judgment.
3. In making and entering its Findings of Fact No. VIII, holding that appellee was not, and is not, required to continue to mine, mill and produce metals, ores, minerals and values from the premises conveyed under the agreement of December 31, 1941, and holding that the appellee has the discretion as to the time, amount, extent and manner of mining, milling and producing minerals, ores and metals and the right to terminate the operations and not to resume the same.

4. In making and entering its conclusions of law No. III that the agreement of December 31, 1941, does not require Bradley Mining Company to mine, mill and produce metals, ores, minerals or values from the premises and that the appellee has the discretion to terminate the mining operations and not to resume the same.

5. In making and entering its conclusions of law No. IV holding that any claims of the appellant against Bradley Mining Company under said agreement of December 31, 1941, are barred by the five-year statute of limitations under Idaho Code, Sec. 5-216.

6. In making and entering its conclusions of law No. V holding that the appellant's Amended Complaint fails to state a claim upon which relief can be granted against appellee because of the failure of the appellee to mine, mill and produce minerals, ores, metals or values from the premises.

7. In failing to hold and find that appellee was obligated under the facts set forth in the Amended Complaint to mine and/or mill and/or produce metals or ores on the conveyed premises.

8. In failing to find and hold that the Amended Complaint of the appellant states a claim against the appellee for its failure to mine, mill or produce metals or ores from the premises under the conditions set forth in appellant's complaint.

9. In failing to find that the appellee is obligated to reconvey the premises to the appellant.

10. In making and entering its Amended Judgment on October 20, 1965, dismissing appellant's complaint with prejudice and holding that the appellant take nothing by the action.

SUMMARY AND STATEMENT OF QUESTIONS PRESENTED

1. Does the agreement of December 31, 1941, constitute:

(a) a deed, or

(b) a lease.

2. If a deed, where the only consideration to the grantor is the payment of royalties, is there an implied obligation and covenant to reasonably explore and develop the mining properties?

3. If a lease, where the only consideration is the payment of royalties, is there an implied obligation and covenant to reasonably explore and develop the mining properties?

4. Does appellee's failure to explore, develop and mine the property constitute an abandonment and forfeiture of all right, title and interest to the mining claims?

5. Does Section 5-216, Idaho Code, which provides that an action upon a written contract must be commenced within 5 years, apply?

ARGUMENT AND AUTHORITIES

I

Provisions of the Contract

The contract of December 31, 1941, between United (the grantor and appellant here) and Bradley (the grantee and appellee here), provides in part (T.R. 8) (emphasis supplied) :

“That the said UNITED for and in consideration of the royalty hereinafter agreed to be paid by BRADLEY, its successors and assigns, to UNITED,

its successors and assigns, and in consideration of the mutual covenant and agreements herein contained *and subject to the royalty herinafter reserved and retained, and the mortgage herein created to secure the payment of said royalty*, has Granted, Bargained, Sold, and Assigned, and does by these presents grant, bargain, sell and assign * * * all the following described lode and placer claims * * *”

And (T.R. 13), (at the bottom of the page) :

“ * * * To Have and To Hold, subject to the royalty herein reserved and retained by UNITED * * *”

And (T.R. 14) :

“For and in consideration of the premises and the conveyance and assignment of the above described properties, BRADLEY * * * does hereby covenant, promise and agree to pay to UNITED * * * a royalty of five percent (5%) on all net smelter returns * * * upon and for all minerals, ores, metals or values, of every kind and character, mined, extracted or taken from the above described mining claims, or any part thereof * * *”

And (T.R. 16) :

“The above covenants on the part of BRADLEY to pay the royalty herein agreed to be paid shall be considered and held to be covenants running with the lands, grounds, minerals, ores, values, and mining claims hereby conveyed to BRADLEY and shall be binding upon BRADLEY, its successors and assigns, forever.

“It is agreed that the time, amount, extent and manner of conducting mining operations and development work upon or in the above-described mining claims shall be in the sole discretion of BRAD-

LEY, its successors, and assigns, and that the failure of BRADLEY to mine shall not be held to be a condition subsequent defeating the conveyance made hereby."

It is then provided that ownership of the properties shall be in Bradley, except (T.R. 16) :

"* * * EXCEPT that in the event BRADLEY, its successors and assigns, fails or refuses to pay any royalties herein reserved when the same shall become due that the *said UNITED shall have a mortgage lien, in, to, and upon all of the above and foregoing described properties to secure the payment of said sums* and BRADLEY does hereby mortgage the above and foregoing described properties, and any interest it may hereafter acquire in the Midnight Group hereinafter described, and the whole thereof, to secure the payment of said royalty."

And as to the Midnight Group of claims (T.R. 17) :

"For and in consideration of the premises, and the covenant of BRADLEY to pay the royalty hereinbefore provided for, UNITED hereby gives and grants unto the said BRADLEY an option to acquire
* * *"

Then it is agreed (T.R. 20) that if Bradley does exercise its option and acquire the Midnight Group the royalty shall be increased to 5½ per cent upon all ores, metals or values extracted.

There appears no other payments or considerations from appellee to appellant the payment of royalties as above set forth being the only consideration, except the performance by appellee of annual assessment work upon the claims within the Midnight Group (T.R. 18-19), and this can hardly be said to be consideration flowing to appellant.

That it was intended that mining operations continue may be ascertained from the provision (T.R. 14-15) that:

“It is agreed that BRADLEY shall furnish UNITED all necessary information that UNITED may require to assure it that it is receiving the royalty to which it is entitled hereunder, and that UNITED shall have the right to inspect, examine and make copies of the books and records of BRADLEY and supporting data at least every six (6) months so as to enable UNITED to satisfy itself that it is receiving its proper royalties.”

II

IMPLIED OBLIGATIONS OF A DEED

The decision of the District Court is that under the contract appellee had the sole discretion of how, when or why it would or should explore, develop and mine the properties. The decision is that appellee has no obligation to mine the property, but if this be correct then there was a total lack of consideration for the agreement, because there was no consideration except the payment of royalties, the amount of which cannot be determined and does not exist until the transferee mines the property. In other words, the decision is to say that appellant gave away the property. However, the circumstances surrounding the transaction, the fact that the property was already being mined at the time of the agreement, the fact that royalty payments were being made, and that the sole and only consideration of the contract of December 31, 1941, was the payment of royalties, negates the proposition that appellant intended to make a gift, but on the other hand gives rise to the conclusion that it was the intent of all parties that the property be mined.

In the case of *Downing v. Rademacher* (Cal) 65 Pac. 385, a deed was issued by the grantor to the grantee and an agreement entered into between the parties whereby the grantor was to receive one-third of all minerals mined. The case is quite similar to the case at bar. Commencing at page 386 the court reasoned (emphasis supplied) :

“Here the consideration of the deed is not simply the agreement to perform service. The purchaser was given exclusive possession of the mine and as payment for his interest agreed that he would render to the vendor one-third of the gross proceeds obtained by working the mine. It is like a conveyance made of the farm for one third of the crops which thereafter should be produced. Suppose such a contract could be made, it would amount to a lease and would imply that the grantee, or his assignees, should farm the land, and no doubt, if they should refuse to perform, the land could be recovered. This conveyance was for a share in the proceeds of the mine, and is in every way analogous to the case supposed. *The technical ideas in regard to leasehold estates do not attach to this, but the equities are the same, and so are the implied obligations to work the mine, that the consideration agreed upon may be paid.*”

Further:

“He did not intend to give his property to Downing without consideration, nor did Downing intend to get it for nothing.”

It is interesting to note in the *Downing v. Rademacher* case, *supra*, the wording in the conveyance was very much like that expressed in the agreement in the case at bar. For the purpose of working the mine, the parties agreed as follows:

"Said party of the first part shall have the exclusive right to work in the mine on said mining claim and mine thereon in any way he shall see fit."

The court also stated:

"As between the parties, at all events, there is no such magic in a conveyance of a title and fee, which can be used to do an owner out of his property. Under this contract and deed all Downing acquired was the right to work the mine in his own way on condition that he deliver to Rademacher one-third of the valuable minerals obtained."

The court in discussing consideration paid by the grantee stated:

"The vendee gets the land at a lower price because of the burden, and so do his grantees. They are *continually* paying for the land." (emphasis added)

The *Downing v. Rademacher* case later came before the Supreme Court and was reaffirmed in 138 Cal. 324, 71 P. 343.

The case of *Sledge v. Stolz*, 41 Cal. App. 209, 182 P. 340, involved a contract and a deed. The case is in point here in that the court held that both instruments must be construed together and to give legal effect to the deed, according to the intention of the parties, it is subject to the condition and obligation that the grantee mine the property in order that the consideration agreed upon can be paid. The court quoted from *Downing v. Rademacher*, and then said:

"It was held that the sole consideration of the conveyance being for a share of the proceeds of the mine, the equities of the grantor are the same as if a conditional leasehold estate had been granted; that there is an implied obligation to work the mine, in

order that the consideration agreed upon may be paid, and as the share of the grantor cannot be determined until the mine is worked out, the grant of the mine is conditional for the protection of the grantor. Among other cases cited in the opinion is *Richter v. Richter*, 111 Ind. 456, 12 N.E. 698, mentioned as 'directly in point'. Explaining this case Judge Temple said (emphasis supplied) :

'* * * True, neither the deed nor the mortgage state in express terms that the estate is granted upon condition, but the word 'condition' is not necessary to an estate upon condition, if it plainly appears from the words used that the intent of the parties was to create an estate of that description.

* * * In the construction of deeds, as in construing other writings, courts seek to ascertain and give effect to the real intention of the parties, as such intention may be gathered from the language of the whole instrument. The intent is what the law applied itself to deeds. * * * *If from the nature of the acts to be performed by the grantee, and the time required for their performance, it is evidently the intention of the parties that the estate shall be held and enjoyed on condition that the grantee perform the acts specified, then the estate is on condition.* This is especially so when the grantor has reserved no other effectual remedy for the performance on the part of the grantee.' "

There would be no object to transferring approximately 500 mining claims to appellee in this case unless it was for the purpose of, and with the intention of, the exploration and mining of said claims.

III.

DOES THE INSTRUMENT CONSTITUTE
A LEASE?

In the case before the court, there was no consideration for the "conveyance" of the mineral claims and mineral rights except the payment of royalties. Was the instrument then a conveyance or was it a lease to continue so long as the grounds were worked and royalties paid?

In *Kentucky Rock Asphalt Co. v. Milliner*, 234 Ky. 217, 27 S.W. 2d 937, the instrument provided in part:

"* * * the party of the first part, in consideration of the sum of Five Dollars, cash in hand paid, and of the agreement of the record party to pay the royalty hereinafter referred to, hereby grants and conveys to the said second party, all of his right, title and interest, in and to all deposits of * * *"

The instrument also gave second party the right of ingress and egress to explore for oils, etc., and to occupy such land as he "may deem reasonably necessary" to so explore, and that if second party found such minerals and removed them then second party should pay a percentage of the profits. This instrument was held to be in fact a lease, rather than a conveyance, requiring development within a reasonable time, although no facts appear in the decision as to any agreement requiring development other than the provision contained in the instrument granting the second party the right of access to reasonably explore the land for such minerals, *it being further held that the second party abandoned all rights under the instrument by failure to develop the land within a reasonable time*, the court saying, after quoting extensively from *Eastern Kentucky Min-*

eral & Timber Co. v. Swann-Day Lumber Co., 146 S.W. 438 (emphasis supplied) :

"Clearly the principles above announced apply with equal force to the case under consideration. The oil, bitumen, and other products in 82¹/₂ acres of land were involved. The cash consideration of \$5, being at the rate of only six cents an acre was merely nominal. The real consideration was the development of the property and the payment of royalties, considering the instrument in the light of its provisions, and the situation of the parties, it is clear that it was never intended that the grantee should hold the property forever without paying anything for the privilege. *In the circumstances there is no escape from the conclusion that the instrument, regardless of the name it was called, was intended as a lease, and was executed on the condition that the property would be developed within a reasonable time. Development having been delayed for more than 30 years, it follows that appellants have abandoned their rights under the instrument and no longer have any interest in the property.*"

Although in the case of *Bardhill v. Sellers*, (Ky) 298 S.W. 2d 5, the instrument expressed an obligation on the grantee to develop the property within a set period, which was held as not particularly controlling in later Texas cases, herein afterward cited, *The court held the instrument to constitute a lease rather than a deed*, saying:

"We construe the opinions in *Eastern Kentucky Mineral & Timber Co.*, 148 Ky. 82, 146 S.W. 438, 46 L.R.A., N.S., 672, and *Kentucky Rock Asphalt Co. v. Milliner*, 234 Ky. 217, 27 S.W. 2d 937, as standing for the proposition that in the case of a conveyance

of mineral rights, an implied condition of reasonable development will be read into the conveyance, unless there is an immediate valuable consideration paid to the grantor, as distinguished from a consideration dependant solely upon the election of the grantee as to future activity. As said in the Swann-Day case, 146 S.W. at page 441: 'we don't think any court should give to a contract like this such a construction as should place it in the power of the grantee, without any loss, outlay or disadvantage, to take, keep and hold indefinitely valuable property rights in the manner attempted in this case.' "

Following the Bardhill v. Sellers case, the Court of Appeals in *Clark v. Wilson*, (Ky.) 316 S.W. 2d 693, held (emphasis supplied) :

"In the Bardhill case we construed the instrument * * * to be a 'lease' rather than a 'deed.' The parties to the Adams instrument did not express an obligation on the part of the grantee or lessee to develop the property within a set period as did the Rideout instrument. *But that provision was not regarded as of vital importance, the decision of the Bardhill case being upon the ground that in such a conveyance of minerals and right an implied duty and condition is annexed to the grant that there will be reasonable development* 'unless there is an immediate valuable consideration paid to the grantor, as distinguished from a consideration dependent solely upon the election of the grantee as to future activity.' *Like the instrument in the Bardhill case, the present one was for a consideration which did not have and never would have had any value 'except when and if the company chose to engage in development of its "leases".'* The decision is not only supported by our

two former cases cited therein, but by other authority as well. See (citing authority), and annotation * * *. 137 A.L.R. 415.

“In * * * (citing authority) *we regarded the real inducement and the consideration for each conveyance (in form absolute) as being the exploration and development of the property and the royalty or percentage of the production.* We, therefore, held the omission of a stipulation as to when development operations shall begin or of a reservation of the right of reentry because of inactivity will not prevent the enforcement of the implied condition that development shall be begun within a reasonable time. We observed in the Eastern Kentucky and Mineral Co. case that this was not a novel method of interpretation, saying (148 Ky 82, 146 S.W. 442) :

‘The books are full of cases in which the courts, to prevent gross injustice, have gathered from the contract and the circumstances surrounding its execution the intention of the parties and construed it to carry out their purpose, although in so doing it was found necessary to supply omissions.’

“We construe the old Adams instrument as being the same as a gas and oil lease. This is necessary to effectuate the actual intention of the parties as reflected by the instrument as a whole in the light of circumstances under which it was made and the purposes sought to be accomplished. (citing authority). *Abandonment and breach of the condition to develop the property forfeited the rights which passed under the Adams lease to the Sand Lick Oil and Gas Company.* Justice v. Burgess, 244 Ky. 774, 52 S.W. 2d 720.”

The Bardhill case is also cited by *Majors v. Easley* (Ky) 328 S.W. 2d 834 as follows (emphasis supplied) :

“* * * A similar instrument conveying those inorganic substances to the Owensboro Hawesville Gas and Mineral Company has been held to have been a lease which imparted a condition of reasonable development, *and that in the absence of such development, the rights granted by the instrument had been abandoned and forfeited.* Bardhill v. Sellers, Ky., 298 S.W. 2d 5. * * *”

In *Payne v. Neuval*, 99 P. 476, at page 478 of the Pacific Report, citing from *Acme Oil & Mining Co. v. Williams*, the court said (emphasis supplied) :

“* * * ‘*These leases are only valuable on development, and are then only valuable to both parties to the extent that the product may be secured and disposed of; and, when the only consideration for the lease is the share which the lessor will obtain of what is provided, there is always an implied covenant that diligence will be used toward production.* * * *”’

There are a multitude of cases where leases are involved that state that in royalty cases *where no other consideration* is involved there is an implied covenant by the lessee to mine in a diligent manner, including *Mountain States Oil Corporation v. Sandoval*, 109 Colo. 401, 125 P. 2d 964 and *Rocky Mountain Fuel Company v. Clayton Coal Company*, 110 Colo. 334, 134 P.2d 1062, at 1067 where it is also held that failure to do so is an abandonment and forfeiture of the lease.

Danciger Oil & Refining Co. of Texas v. Powell, 137 Tex. 484, 154 S.W. 2d 632, is interesting and in point in this: The court recognizes that an implied covenant to develop may be read into an instrument of convey-

ance to give effect to the intention of the parties as gathered from the instrument. However, in this case there was a cash consideration of \$50,000.00, with future consideration to be paid in royalties, but to be paid in monthly installments irregardless of the income of the grantee, the court by reason of the cash payment held this particular contract to constitute a conveyance and not a lease, but reasoned (emphasis supplied) :

“* * * It is not enough to say that an implied covenant is necessary to make the contract fair, or that without such a covenant it would be improvident or unwise, or that the contract would operate unjustly. *It must arise from the presumed intention of the parties as gathered from the instrument as a whole.* (citing authority) *However, covenants will be implied in fact when necessary to give effect to the actual intentions of the parties as reflected by the contract or conveyance in its entirety in the light of the circumstances under which it was made and the purposes sought to be accomplished thereby.* * * *”

“ There are numerous authorities in Texas which recognize the doctrine of an implied covenant in the usual gas and oil mining lease for the reasonable development of the property after the discovery of gas or oil in paying quantities. (citing authority). “In recognition of the distinction between a lease and a conveyance of the minerals, some authorities seem to hold that if the instrument is a lease there is an implied covenant for reasonable development after discovery of oil, but if the instrument is a conveyance of the minerals there is no such implied covenant.” * * *

“*However, we are of the opinion that there can be such an implied covenant to develop property even*

though the instrument be a conveyance of the minerals and not a lease. This court so held in the *Freeport Sulphur Company v. American Sulphur Royalty Company* case, *supra*. It must be recognized, however, that there is a much stronger reason for favoring an implied covenant under an ordinary * * * lease than there is in a conveyance of the minerals * * *. But the most essential difference is the fact that the predominating purpose of a lease is to secure the exploitation and development of the property for the purposes set out in the lease. *Often the consideration paid to the lessor as a down payment is very small, and it is evident that the main purpose in granting the lease is the lessor's desire to have his land promptly explored, and thoroughly and diligently developed, with the hopes of receiving more handsome returns in royalties.* (citing authority). On the other hand, conveyances of minerals are frequently actuated by a motive of investment on the part of the grantee, and the cash consideration or other down payment is the moving cause for the conveyance by the grantor.

The decision of the District Court is to the effect that appellee has the *arbitrary* discretion to discontinue all operations, at any time it deems fit, for as long as it deems fit. This construction destroys all consideration for the agreement, and negates all purposes for entering into the agreement, and states in effect that the contract relating to mineral properties was never entered into for mining purposes.

On the other hand, the consideration for the lease was the payment of royalties. There was no reason for the agreement on the part of either party except for the purpose of mining operations. The instrument

(lease or deed) related to mining property only. As said in the Swann-Day Lumber case, *supra* "it is clear that it was never intended that the grantees should hold the property forever without paying anything for the privilege. In the circumstances there is no escape from the conclusion that the instrument, regardless of the name it was called, was intended as a lease."

True, the "lease" was for a period of "(999) years" and *as long thereafter as minerals*, ores or values shall be extracted: (T.R. 14), but we see no difference between 59, 99 or 999 years as far as the nature of the instrument is concerned.

IV.

ABANDONMENT

The *Kentucky Rock Asphalt Co. v. Milliner*, *supra*, *Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co.*, *supra*, *Clark v. Wilson*, *supra*, and *Majors v. Easley*, *supra*, are all authority that upon failure of the grantee to perform the implied obligations to explore and mine there is an abandonment and a forfeiture. In the instant case it should be decreed that appellee has no right, title or interest to the mining claims still held by appellee.

V.

STATUTE OF LIMITATIONS

The statute of limitations does not begin to run until a complete cause or right of action accrues.

54 C.J.S. Lim. of Actions, Sec. 108

A right of action does not accrue until there is a right to maintain a suit capable of present enforcement. The time test is to determine when a person could

have first maintained an action to a successful result, regardless of when the actual damage results.

54 C.J.S. Lim. of Actions, Sec. 109

Where a party's right depends upon the happening of a future event, the cause of action accrues, and the statute of limitations begins to run, only at the time the event happens.

"whether the contingency affects the right or merely the amount of recovery, the rule is the same; if plaintiff is entitled to recover a greater or smaller amount, dependent upon a certain contingency which may or may not happen, the statute runs against him only after the amount to which he is entitled becomes certain."

54 C.J.S. Lim. of Actions, Sec. 110

In the case of a continuing contract, the person affected at his option may elect the time at which he decides to no longer rely upon performance by the promisor.

54 C.J.S. Lim. of Actions, Sec. 151

Union Sugar Co. v. Hollister Estate Co. 47 P. 2d 273, 3 Cal. 2d 740

And even in those jurisdictions where it is held that the statute runs, still where it is a continuing covenant running from day to day, the fact that part of the claim is barred will not prevent action for that part of the claim which is not barred.

54 C.J.S. Lim. of Actions, Sec. 151

Indian Territory Illuminating Oil Co. v. Rosamond 120 P. 2d 349, 190 Okl. 46, 138 A.L.R. 246, which was a case of a gas and oil lease, and was a case for re-

covery of damages for failure to drill protective drainage wells, the court said:

“* * * that the lessee will protect the land from drainage by adjoining wells so long as the drilling of a protective well or wells will, in the judgment of a reasonably prudent operator, be a profitable undertaking, is a continuing covenant, the obligation resting upon the lessee during the existence of the lease, or as long as his ownership thereof continues. Plaintiff was not required to treat defendant's failure to drill the well in 1929 as a complete breach of the lease, and bring an action for the cancellation and forfeiture thereof. Obviously he could not then bring his action for damages which he might suffer during the future life of the lease, for such damages would be contingent, speculative, and wholly incapable of ascertainment. See 37 C.J. 852; 34 Am. Jur. 111. The implied covenant being a continuing covenant, the right to maintain an action for its breach continues so long as the breach continues and plaintiff is damaged thereby.

* * *

“The reason for the rule is that while the repeated and successive breaches of the implied covenant continue, the right of action for subsequent breaches does not accrue upon the first breach, but accrues and the statute begins to run as and when each breach occurs. Like an account not mutual in nature, but all on one side, the cause of action arises on the date of each item or breach, and the items within the statutory period of limitations do not draw after them those of longer standing. (citing authority)”

Appellee's breach is a continuing breach which is continuing yet today. Moreover, the removal of facilities

continued up to 1964. (T.R. 44), which brings into question the actual date of the breach.

CONCLUSION

We respectfully submit the agreement involved in this case constitutes a lease of mineral lands, but whether it be a lease or a deed the legal effect of the instrument is that it carries with it the duty and obligation to explore, develop and mine the properties therein described. Whether it be a lease or a deed, it is a continuing obligation, from day to day, from week to week, from year to year, and a failure of such obligation is a forfeiture of right of title and possession and also gives rise to a cause of action for any and all damages sustained.

CERTIFICATE

We certify that in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

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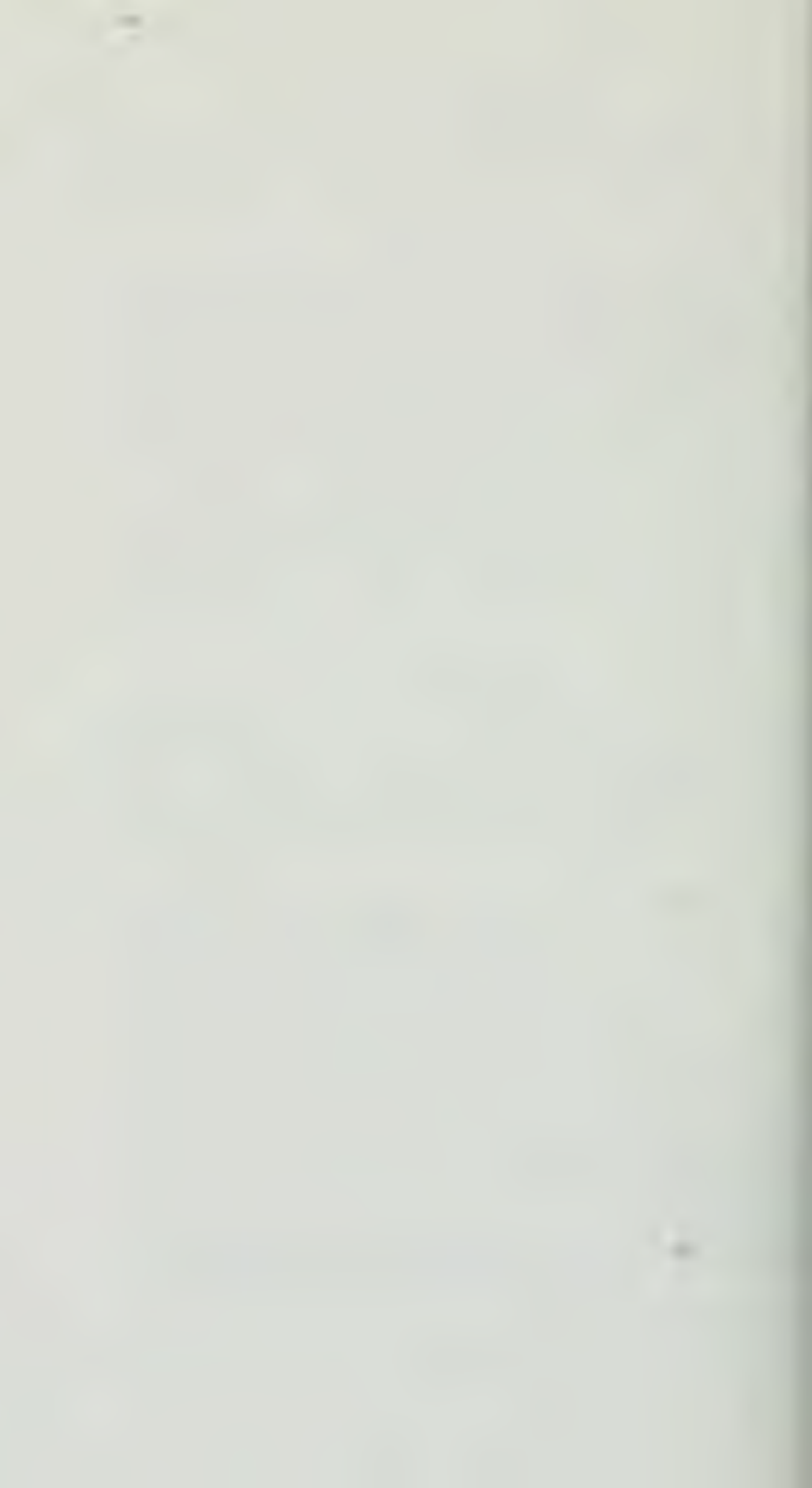
Boise, Idaho

Receipt of three copies
accepted this ____ day of
March, 1966.

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By _____

Attorneys for Appellees



IN THE
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Court of Appeals
For the Ninth Circuit

HARLOW H. OBERBILLIG, as administrator
of the Estate of J. J. Oberbillig,

Appellant,

vs.

BRADLEY MINING COMPANY,

Appellee.

BRIEF OF APPELLEE

*On Appeal from the District Court of the
United States for the District of Idaho,
Southern Division*

FILED

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V

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BRIEF OF APPELLEE

*On Appeal from the District Court of the
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JURISDICTIONAL STATEMENT

Jurisdiction in the United States District Court for the District of Idaho, Southern Division, was established pursuant to the requirements of 28 USCA 1332, upon diversity of citizenship, plaintiff being a resident and citizen of Idaho. (T.R. 35-36, 50), defendant being a California corporation with principal place of business in California (T.R. 36, 50), and the amount in controversy, exclusive of interests and costs, exceeding \$10,000.00 (T.R. 6, 50).

This court has jurisdiction to hear the appeal under the provisions of 28 USCA 1291 and Rule 73,

Federal Rules of Civil Procedure, the appeal being from a final judgment dismissing appellant's complaint.

STATEMENT OF THE CASE

Simply stated, this is a case where one party (the appellant) conveyed a group of mining claims to another (the appellee) in return for a promise to pay royalties on any production and with the express provision that the latter should have sole discretion as to if, when, and how it would work the claims. The appellee went onto the property, built an entire town around its production, and produced extensively for some 10½ years, paying royalties in the process amounting to more than 1.4 million dollars. Then, without objection, and with subsequent assurance by the appellant that it had the right to mine or not to mine as it saw fit, the appellee ceased operations and began tearing down the town. Now, more than 12 years later, the appellant seeks return of the property and recovery of damages for failure to mine. The district court dismissed the complaint for failure to state a cause of action, and the appellant has appealed.

The document of conveyance, entitled "Conveyance, Royalty Agreement and Option" (T.R. 8-23) was executed by the appellant's predecessor, United Mercury Mines Company, and the appellee, Bradley Mining Company, under date of December 31, 1941. By its terms it was agreed that United:

"for and in consideration of the royalty hereinafter agreed to be paid by BRADLEY, its successors and assigns, to UNITED, its successors and

assigns, and in consideration of the mutual covenants and agreements herein contained, and subject to the royalty hereinafter reserved and retained, and the mortgage herein created to secure the payment of said royalty, has granted, bargained, sold and assigned, and does by these presents grant, bargain, sell and assign, unto BRADLEY, its successors and assigns," (T.R. 8)

certain lode and placer mining claims in the Yellow Pine Mining District, Valley County, Idaho, together with certain easements of tailing pond and water rights of way, millsites, warehouses, etc.

In consideration of the above, the appellee agreed to pay to United a royalty of five percent on all net smelter returns from "all minerals, ores, metals or values, of any and every kind and character, mined, extracted or taken" from the specified premises for a period of "nine hundred and ninety-nine (999) years and as long thereafter as minerals, ores or values shall be extracted, mined or taken from the above described property." (T.R. 14)

The document provided that the appellee would furnish UNITED "all necessary information that UNITED may require to assure it that it is receiving the royalty to which it is entitled hereunder" (T.R. 14-15) and that the covenants on the part of the appellee to pay the royalty would be considered covenants running with the land (T.R. 16). It then provided:

"It is agreed that the time, amount, extent and manner of conducting mining operations and development work upon or in the above-described

mining claims shall be in the sole discretion of BRADLEY, its successors and assigns, and that the failure of BRADLEY to mine shall not be held to be a condition subsequent defeating the conveyance made thereby." (T.R. 16)

The document further provided:

"Anything in this agreement contained to the contrary notwithstanding, it is the intention of the Parties to this agreement that the full ownership, possession and control of all the properties above described, and the full ownership, possession and control of all the properties hereinbefore in this instrument conveyed, and all of the personal property acquired and/or used on or in connection with the operation and development of the above described properties, shall be vested in BRADLEY, and the UNITED shall have no interest in fee in or to said properties..." (T.R. 16)

except that United was to have a mortgage lien to the properties to secure payment of the agreed royalties (T.R. 16).

The document also granted to the appellee an option to acquire certain other lode mining claims within one year following (T.R. 17-23). And, in Paragraph IX thereof, it stated that:

"It is agreed that this conveyance and agreement to pay royalties and option agreement settles and adjusts all claims of every kind and character which UNITED has against BRADLEY, the F. W. Bradley Estate, the Yellow Pine Company, and the Bradley Mining Co., on account of any non-performance by F. W. Bradley, the Yellow

Pine Company and/or the Bradley Mining Co.; . . . and that after Midnight, December 31, 1941, the effective date of this instrument, all other contracts between the Parties hereto shall be held and considered merged in this instrument, . . .” (T.R. 22.)

Appellee entered upon the mining properties and explored and mined them from 1941 until July 26, 1952 (T.R. 38), extracting therefrom gold, silver, antimony, and tungsten in substantial quantities (T.R. 41-42). As a result of its operations and pursuant to the agreement, the appellee has paid to United Mercury Mines Company the sum of \$1,463,-754.43 as royalties (T.R. 26).

In 1951, the appellant’s predecessor in interest filed an action in United States District Court for the District of Idaho, Southern Division, reported on appeal as *United Mercury Mines Co. v. Bradley Mining Co.*, 259 F.2d 845 (the records, files and exhibits of which have been transmitted to this Court for inspection pending final disposition of the appeal herein, T.R. 117), which case involved the same properties, mining claims and “Conveyance, Royalty Agreement and Option” referred to above (T.R. 26).

In 1952, with full knowledge of appellant’s predecessor in interest and without objection of any kind, the appellee ceased mining operations on the property in question and began removal of the mining, milling and smelting equipment therefrom shortly thereafter, completing the removal of the equipment during the year 1958 (T.R. 26-27). In 1955, 1957, 1960 and 1963, the appellee reconveyed to United certain of the mining claims involved, at the same time retaining others (T.R. 43-44).

On February 27, 1957, some five years after the appellee's cessation and termination of mining operations on the property herein involved and after reconveyance of certain of the aforementioned claims, a pre-trial conference was held in the District Court in the suit mentioned above. At that conference, Mr. Casterlin, as an attorney for United Mercury Mines Company, stated the following:

"I am trying to explain why a good portion of the contention of the defendant is not applicable here because the relationship of lessor and lessee existed up until 1941. On December 31, 1941, the new contract provided that the title to this property would pass to Bradley, Bradley then owned it. Under this new agreement as quick as Bradley owned the title to the claims, owned the title to all the minerals that were produced, then it was their property to do with as they saw fit. And this contract of 1941 contains a peculiar provision that Bradley could work this property as, if and when it desired. It could let that property stay there forever and not work it. In other words, Bradley not only owned the claims, Bradley owned the minerals, everything that was produced up there. It could do as it saw fit with those things." (Page 39 of the Reporter's Transcript of Pre-trial Conference, T.R. 117.)

On January 7, 1965, more than 12 years after cessation and termination of mining operations and nearly seven years after completion of removal of the equipment involved, the appellant filed the instant action, seeking judgment for damages in the amount of \$107,485.50 and for reconveyance to the appellant of the mining claims still held by the ap-

pellee (T.R. 6 and 39). The complaint, as amended (T.R. 35-40), alleged that there were and are large quantities of commercial ore on the premises that could be mined by the appellee, that the appellee is required under the aforementioned agreement to mine, mill and produce said minerals, and to pay to appellant the specified royalty thereon, and that the appellee has refused to do so, notwithstanding demand therefor by the appellant (T.R. 38-39). The appellee filed a motion to dismiss, alleging that the complaint filed to state a claim upon which relief could be granted (T.R. 24). The motion was treated and heard as a motion for summary judgment (T.R. 46) upon the amended complaint (T.R. 35-40) and the affidavits of Eugene C. Thomas (T.R. 26-27) and Harlow H. Oberbillig (T.R. 41-44). The court entered its memorandum decision (T.R. 46-48) granting the summary judgment and entered findings, conclusions (T.R. 49-54) and judgment (T.R. 55-56) thereon.

Appellant has now appealed to this Court.

SUMMARY OF POINTS

1. The express terms of the conveyance, royalty agreement and option leave no room for an implied covenant to develop in that the appellee was given sole discretion as to time, amount, extent and manner of operations and it was provided that failure to mine would not defeat the conveyance.

2. Since the decision as to when to mine is within the sole discretion of the appellee, the appellant may not substitute his own judgment as to when to mine.

3. The appellant's claim is barred by the five-year statute of limitations provision of Section 5-216 of the Idaho Code.

4. The complaint failed to allege compliance with the possession requirements of Section 5-203 of the Idaho Code.

5. The appellant has acquiesced in the appellee's position that it has no duty to mine, has waived any claim based upon a duty to mine, and is estopped from asserting any duty to mine.

6. Prior litigation between the appellant's predecessor and the appellee is *res judicata* as to this action in that the matters involved here could have been raised in the prior action.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DISMISSED THE APPELLANT'S COMPLAINT, BECAUSE IT ALLEGED NO FACTS THAT WOULD CONSTITUTE A BREACH OF ANY TERMS OF THE CONVEYANCE, ROYALTY AGREEMENT AND OPTION, SINCE THE DECISION OF WHETHER TO MINE, AND HENCE BECOME LIABLE FOR ROYALTIES, IS WITHIN THE SOLE DISCRETION OF THE APPELLEE.

By its express terms, the Conveyance, Royalty Agreement and Option alleged in the complaint provides that the decision as to whether the claims should

be mined is within the sole discretion of the Bradley Mining Company. It then explicitly states that the failure to mine shall not result in a forfeiture:

“It is agreed that the time, amount, extent and manner of conducting mining operations and development work upon or in the above-described mining claims shall be in the sole discretion of BRADLEY, its successors, and assigns, and that the failure of BRADLEY to mine shall not be held to be a condition subsequent defeating the conveyance made hereby.” (T.R. 8)

The document is also explicit in providing that no royalties are payable under any circumstance except on a cash basis and during the actual operation of the property. A royalty is due on “all net smelter returns” upon and for minerals “mined, extracted or taken” from the mining claims (T.R. 14). Said royalty is payable only for months “when any net smelter, mint, or other returns are received by BRADLEY” (T.R. 14).

Thus it is manifest from the clear and unambiguous terms of the written agreement of the parties that the appellee could operate or not operate the property as, within its sole discretion, it elected to do. If it did not operate, it had no obligation to pay royalties. Absent bad faith or fraud—neither alleged here—there could be no right of action by the appellant for any failure by the appellee to mine.

The appellant now contends that the Court should find in this clear and unambiguous document an implied obligation and covenant to reasonably explore and develop the mining property. Such a contention

is clearly without merit. Where the parties have expressly covered the subject in their written agreement, there is no room for an implied covenant to the contrary.

The general rule is succinctly stated in 20 Am. Jur. 2d, Covenants, Conditions and Restrictions, Section 12, at pages 584-585:

“(I)mplied covenants are not favored in the law. The courts will declare implied covenants to exist only where there is a satisfactory basis in the express contract of the parties which makes it necessary to imply certain duties and obligations in order to effect the purpose of the parties to the contract made. Such covenants can be justified only upon the ground of legal necessity arising from the terms of a contract or the substance thereof, and the circumstances attending its execution. The implication from the words must be such as will clearly authorize the inference of an imputation in law of the creation of a covenant. It is not enough to say that the covenant is necessary to make the contract fair, that the contract ought to have contained a stipulation which is not found in it, or that without such covenant the contract would be improvident, unwise or operate unjustly.

“Implied covenants can arise and will prevail only where there is no expression on the subject matter of the implied covenant, *and an express agreement or covenant excludes the possibility of an implied one of a different or contradictory nature.*” (Empasis added)

An argument substantially identical to that of the appellant was considered in the case of *Warren v.*

Amerada Petroleum Corp., 211 S.W. 2d 314, in which the plaintiff brought suit upon an oil lease, alleging the failure of the defendant to drill a well and contending the existence of an implied covenant in the lease that drilling would begin within a reasonable time. The lease contained the following provision:

“During the said (primary) term, except as may be otherwise required by paragraph 3 hereof, lessee shall have the right at will to begin, abandon or resume operation on the premises.”

The Texas court ruled that the plaintiffs had failed to state a cause of action, responding to the contention that there was an implied covenant with the following statement, at page 317:

“But there is no room for an implied covenant where the lease contract itself makes the matter of development discretionary with lessee at his own will as was obviously the case in the original lease executed by Bell to lessee. The terms of that lease and the intention of the parties are clearly expressed in plain language and courts will not undertake to write a new and different contract or to change the terms of one when the parties have stated their intentions clearly and in simple language. *Cowden v. Broderick & Calvert*, 131 Texas 434, 114 S.W. 2d 766, 177 A.L.R. 61. The original lease above referred to contains an express covenant which precludes the application of any implied covenant for prudent development or for development within a reasonable time (Citing cases)”

The appellant here mistakenly places reliance on a case such as *Kentucky Rock Asphalt Co. v. Milliner*,

234 Ky. 217, 27 S.W. 2d 438, where the agreement between the parties was silent as to the duty of the grantee, or a case such as *Downing v. Rademacher*, (Cal), 65 Pac. 385, 71 Pac. 343, where the parties expressly agreed that the grantee or lessee should mine, but neglected to specify when. Here, the parties left no room for implication because they explicitly covered the complete subject of the appellee's obligations.

Likewise inapplicable are the other cases cited by the appellant in which the parties have expressly specified some duty on the part of the grantee to develop or begin developing the property, such as *Bardhill v. Sellers (Ky)*, 298 S.W. 2d 5, where the grantee was to drill at least one well within two years; *Sledge v. Stolz (Cal.)* 182 Pac. 340, where the contract provided that once the grantees had commenced work they should "diligently continue and prosecute such work" until they considered it not profitable; and *Rocky Mountain Fuel Co. v. Clayton Coal Co.*, 110 Colo. 334, 134 P.2d 1062, which involved a lease providing for a minimum annual production once begun by the lessee; or cases such as *Payne v. Neuval (Cal.)*, 99 Pac. 76, which involved an agreement calling for a royalty on 300 tons annually, whether taken or not. Here the parties set no requirement for beginning or continuing production, but specified explicitly that the appellee should have sole discretion as to "time, amount, extent and manner" of operating the claims and that royalties should be payable only when there was actual production.

The conditions under which a court will find an implied provision in a written document are well

described in *Dancinger Oil & Refining Co. of Texas v. Powell (Texas)*, 154 S.W. 2d. 632, another case cited and quoted extensively in the appellant's brief. In that decision, the court stated, at page 635:

“In the outset it should be noted that when parties reduce their agreements to writing, the written instrument is presumed to embody their entire written contract, and the court should not read into the instrument additional provisions unless this be necessary in order to effectuate the intention of the parties as disclosed by the contract as a whole. An implied covenant must rest entirely on the presumed intention of the parties as gathered from the terms as actually expressed in the written instrument itself, and it must appear that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so, or it must appear that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument. It is not enough to say that an implied covenant is necessary in order to make the contract fair, or that without such a covenant it would be improvident or unwise, or that the contract would operate unjustly. It must arise from the presumed intention of the parties as gathered from the instrument as a whole. (Citing cases)”

The *Dancinger* case is also authority for the proposition that there is a much stronger reason for favoring an implied covenant under an ordinary lease than in the case of a conveyance of the minerals. The appellant devotes much of his brief to an apparent

contention that the document involved here was a lease rather than a conveyance. However, he fails to meet the fact that, in addition to using language of conveyance throughout, the parties expressly provided:

“Anything in this agreement contained to the contrary notwithstanding, it is the intention of the Parties to this agreement that the full ownership, possession and control of all the properties above described, and the full ownership, possession and control of all the properties hereinbefore in this instrument conveyed, and all of the personal property acquired and/or used on or in connection with the operation and development of the above-described properties, shall be vested in BRADLEY, and the UNITED shall have no interest in fee in or to said properties . . .” (T.R. 16)

Thus, what we have here is clearly a conveyance.

What the appellant seeks is to have the Court rewrite the agreement of the parties. The Conveyance, Royal Agreement and Option as written is a clear expression of the intention of the parties—there is nothing from which to presume an implied covenant to produce.

In the first place, as stated before, the parties expressly covered the complete subject by providing that the appellee should have “sole discretion” as to “the time, amount, extent and manner” of the operations. Furthermore, they expressly covered the possibility that the appellee might fail to mine, by providing “that the failure of BRADLEY to mine shall not be held to be a condition subsequent defeating the conveyance.” No case cited as authority by the appellant involved an agreement like this—where the very

circumstance sought to be covered by an implied covenant has actually been covered by an express provision to the contrary!

In addition, we have here an agreement resulting from an armslength transaction between knowledgeable mining companies who had been dealing with each other for years (T.R. 22). There is nothing like the relationship between the big oil company and the little unsophisticated farmer to suggest that one party could take undue advantage of the other. Likewise, unlike the oil and gas cases is the fact that the minerals here are stable substances—they are not going to go anywhere unless the appellee mines them, and then the appellee must pay royalties. Nor can any third party come in and drain away the resources and thus deprive the appellant of his royalty, as might be the case with property over a common oil or gas pool where failure to develop diligently may result in the pool being drained by operators on adjoining land. The very fact that the agreement to pay royalties was agreed to remain in effect for 999 years plus is an indication in and of itself that the parties must have contemplated periods of inactivity. It would be inconceivable that they could otherwise even consider such a term for the agreement.

It is also significant that the Conveyance, Royalty Agreement and Option here was expressly stated as being in settlement and adjustment of existing disputes between the parties. This alone would constitute adequate legal consideration for whatever other provisions might be contained.

As to further consideration, we can only speculate as to what sort of royalty the parties might have agreed to if the conveyance had included an obliga-

to development controlled, stating the following at pages 1170-1171:

“The trial court did not err in sustaining the general demurrer to the second count of the petition in which plaintiff in error sues for damages on a count of failure of defendants in error, after the discovery of oil in paying quantities upon the 160-acre tract, to continue reasonably to develop the said tract by drilling and equipping other wells. The implied obligation to develop with reasonable diligence would have arisen after the discovery of oil in paying quantities in the first well if the parties to the lease had not contracted with respect to the development of the leased premises. (Citing cases) The lease is not silent upon the subject of development. It requires the lessee in the event of production on adjoining land to drill proper and necessary offsets and then provides: ‘Lessor agrees that all other developments shall be at the discretion of the lessee.’ The judgment or discretion of the lessee exercised in good faith is not the same measure for the lessee’s obligation in the matter of development as the reasonable development required by the implied covenant which arises in the absence of expressed stipulation as to development.”

Cases subsequent to *Cowden* have made it clear that in order to found a cause of action when the discretion to develop or operate is given to a lessee or grantee there must be a showing of bad faith amounting to proof of fraud. in *King v. Swanson*, 291 S.W. 2d 773, the court dealt with leases containing the provision that “all operations of said leases shall at all times be within *the sole discretion* of the

undersigned assignor, its successors and assigns . . .” (Emphasis added) The case was tried on the theory that there must be a showing of bad faith on the part of the lessee. In reversing a judgment for the lessor, the court stated the following at page 775:

“Proof of bad judgment is not proof of bad faith. To prove bad faith some improper motive must be shown.”

In explaining the decision, the court noted that the failure to develop affected one party in the same manner as the other, the implication being that when discretion is vested in one party with the profit motive, the other should not be able to substitute his judgment in the absence of a showing of bad faith in the exercise of the discretion. This consideration is particularly significant here because of the virtually perpetual nature of the royalty agreement. It must have been contemplated by the parties that there would be periods of inactivity within the term.

In the case of *Gex v. Texas Company*, 337 S.W. 2d 820, the Texas court dealt with a “mineral deed” executed by the plaintiff to the defendants. The deed provided that the decision as to drilling or mining both before and after production was wholly at the option of the grantee and that payment of a royalty was contingent upon production. The plaintiff alleged that there was a question as to whether the grantee had acted as a reasonably prudent operator in marketing the gas. The court granted summary judgment for the defendants, holding that the express covenant eliminating any obligation to develop or produce precluded any implied covenant to market. Quoting from a prior opinion the court stated the following at page 827:

“There being no allegation of fraud, accident or mistake and no attempt by the parties to reform the mineral deed, the court will give effect to the intention of the parties as expressed by the terms and provisions of the instrument.”

Nothing in the record indicated an improper motive on the part of the grantee, and, therefore, the express provisions of the mineral deed controlled to defeat the action.

Even where parties have expressly agreed that a lessee would develop the property, the courts have refused to second-guess the judgment of that lessee, in the absence of a showing of fraud. In *Kellar v. Craig*, 126 Fed. 630, the plaintiff alleged forfeiture of a lease for oil and gas rights on the grounds that the defendant had failed to “well develop” the land leased. The court sustained the defendant’s demurrer, and in discussing the covenants to protect lines and to develop the property, stated the following at page 633:

“In such leases, where general covenants of that character are found or are implied, the lessee or his assigns are permitted to determine the character of the work to be done, and such ascertainment by him or them, in the absence of fraud, disposes of the question.”

In the present case, there not only is no express covenant to develop, the parties have explicitly agreed that the entire question of operations shall be at the sole discretion of the appellee. Thus there is no room for application of any standard except the judgment of Bradley Mining Company so long as exercised

without a fraudulent intent, or, at the very least, without bad faith. Again, it is significant that the present cause does not involve oil and gas. Wilson I. Snyder, *Mines & Mining*, Vo. 2, Sec. 1181, points out that "oil and gas being the most uncertain, fluctuating, volatile and fugitive of minerals, a more rigid rule should be applied in the construction of such leases than in the case of ordinary minerals, and, unlike ordinary mining leases, they will be construed most strongly in favor of the lessor." The cases cited above have been concerned primarily with oil and gas leases, which the courts would strictly construe in favor of the lessor. Yet even there the courts have enforced the agreement which the parties have made, and when there has been an agreement that discretion shall be in the hands of the lessee, the courts have respected that provision.

Here there is no suggestion that the minerals involved are transitory or likely to be dissipated and hence cause a loss of resources or of royalties. Nor is this a short term lease whose purpose might be defeated by failure to mine or develop for a period of time. The length of the term in which royalties must follow production is built in "protection" for the lessor. Nor is this a case like *Clark v. Wilson (Ky.)* 316 S.W. 2d 693, or *Downing v. Rademacher, supra*, where there was no significant production by the lessee or grantee, or like *Mountain States Oil Corp. v. Sandoval (Colo.)*, 125 P. 2d 964, where there was production but failure to pay royalties.

Incredible as it seems, appellant contends, in effect, that there has been a failure of consideration. Such is patently not the case! Not only, as noted above, was there settlement of existing disputes between

the parties—consideration sufficient in itself to meet the requirements of the law—there has also been actual development and production by the appellee for a period of some 10½ years. Pursuant thereto, there has been payment by the appellee to the appellant of more than 1.4 million dollars in royalties! And, there remains the obligation to continue to pay royalties whenever, with better market conditions, the appellee elects to return and mine some more.

The appellant, at page 19 of his brief, asserts that the holding of the district court is to the effect that the appellee has the *arbitrary* discretion to discontinue all operations, at any time it deems fit, for so long as it deems fit. This is clearly not so. The appellant attempted to amend the original findings of fact and conclusions of law to preface the word “discretion” as attributed to the appellee with the adjective “absolute” (T.R. 110, 114, 115). The court rejected these proposed amendments, thus holding in accordance with the cases cited above that the appellee’s discretion must be recognized and upheld, *absent a showing of fraud or bad faith*. It was not necessary to express the *underlined* phrase because the appellant had failed to put any such allegation in his complaint.

As noted before, what the appellant really seeks is to have the courts rewrite a bargain that he has decided now he doesn’t like. An analogous situation has from time to time arisen in cases in which an employee of one party has been designated as an arbiter of disputes in construction contracts. Thus, in *Choctaw & M. R. Co. v. Newton*, 140 Fed. 225, 232, 233, the court explained the principles and reasoning applicable to such situations:

“In making such a contract the parties dealt with each other at arms length. The contractors were at perfect liberty to consent to the provisions of the contract or to refrain from bidding. They are presumed, before bidding or signing the contract, to have fully advised themselves of the competency, integrity, and judicial fairness of the selected umpire. Their voluntary acceptance of him as the final arbiter on disputed matters, as declared in the contract, precludes them from any consideration or sympathy because of the engineer being in the employ of the railroad company . . . The contractor is presumed to protect himself against possible loss resulting from any adverse judgment of the engineer by the amount of his bid; and when litigation arises over the decisions and award of such an umpire, the courts cannot, without making a new contract for the parties, disregard such positive provisions, or set aside the action of the umpire, except for the most grave and cogent reasons.”

The decision continued to state that the showing must be that the arbiter was guilty of fraud or the equivalent of fraud.

In like manner, the court in *Guild v. Andrews*, 13 Fed. 369, 371, stated the following with regard to a contract in which an employee of one party was designated the arbiter:

“A stipulation in a contract like the one here sued upon, making an engineer, inspector or other person, the arbiter of the amount and character of the work done, its conformity to the contract, and the compensation to be paid, is valid and obliga-

tory upon the parties, and the action of the arbiter thereunder is final and conclusive, in the absence of fraud or such gross mistakes as imply bad faith or a failure to exercise an honest judgment.”

The reasoning of the *Choctaw* and *Guild* cases applies directly to the case at hand. In effect the Conveyance, Royalty Agreement and Option designates the appellee as the arbiter of when and to what extent it shall mine the properties. That discretion cannot be withdrawn except on a showing of fraud or its equivalent. Thus the appellee's decision to cease operations, within its discretion, is final and conclusive. As the complaint alleged only facts conforming precisely to performance within the clear and unambiguous terms of the agreement, it failed to state a cause of action, and it was properly dismissed by the court below.

III

THE DISTRICT COURT PROPERLY DISMISSED THE APPELLANT'S COMPLAINT IN THAT ANY CLAIM WHICH THE APPELLANT MAY HAVE HAD BY REASON OF APPELLEE'S FAILURE TO MINE, MILL AND PRODUCE UNDER THE CONVEYANCE, ROYALTY AGREEMENT AND OPTION HERE IN QUESTION WAS BARRED BY THE FIVE-YEAR STATUTE OF LIMITATIONS PROVISION OF SECTION 5-216 OF THE IDAHO CODE.

It appears on the face of the complaint that the cessation of operations by the appellee alleged to be in breach of the written Conveyance, Royalty Agree-

ment and Option occurred in the year 1952. The appellant or his predecessor could have brought suit at that time. Obviously the mineral deposit (assuming it to exist) which the appellant asserts that the appellee is obligated to mine must also have existed when mining operations ceased in 1952, and continued to exist during all the intervening years. Yet this action was not commenced until January 7, 1965—more than 12 years after the alleged breach!

In Idaho, actions founded on a written obligation must be commenced within five years. Section 5-216 of the Idaho Code provides as follows:

*“Action on written contract—Within five years:
“An action upon any contract, obligation or liability founded upon an instrument in writing.”*

Thus the complaint shows on its face that the cause of action is barred by the statute of limitations.

The appellant contends in his brief that the agreement in question is in the nature of a continuing contract so that according to authorities the person affected at his option may elect the time at which he will seek legal recovery. Such a contention fails to do justice to the facts.

The agreement here, when read together with the alleged breach, was not the sort of contract envisioned by the authorities cited by the appellant where there is something to be done by a promisor year after year and the fact that he doesn't do it one year cannot be taken to mean that he won't perform as required the following year. It did not involve mere failure to exercise good farming practices as in

Union Sugar Co. v. Hollister Estate Co. (Idaho), 147 P2d 273, or failure to drill protective drainage wells as in *Indian Territory Illuminating Oil Co. v. Rosamond (Okla.)*, 120 P.2d 349, the cases cited by the appellant. Here the occurrence alleged as a breach was a conclusive, overt action—cessation of operations, followed by removal of equipment. It is hard to imagine how it could have been any more final.

Even if it were somehow said that a cause of action continued throughout the removal of the mining equipment, that was completed in 1958—nearly seven years before the filing of this action!

Appellant asserts, at pages 22-23 of his brief, that removal of facilities continued until 1964, bringing in question the actual date of the alleged breach. Yet his own affidavit reveals that there was a general auction of facilities in 1957 (T.R. 43)—removal in the years following was merely the aftermath of disposal at the auction. If a general auction of all facilities following cessation of operations and concurrent with removal of mining equipment, did not establish “the breach,” if any there be, then what possibly could? And, 1957 was eight years before the filing of the action!

In short, if the statute of limitations has not run as to the appellant’s claim, then it never will, and statutes of limitation will be forever meaningless. Here, the provision of the Code is clear. The complaint, on its face, has failed to comply with that provision. Thus, the action is plainly barred, and the court below properly so held.

IV

DISMISSAL OF THE COMPLAINT SHOULD BE UPHELD ON THE FURTHER GROUND THAT THE APPELLANT FAILED TO ALLEGE COMPLIANCE WITH THE PROVISIONS OF SECTION 5-203 OF THE IDAHO CODE.

In addition to the claim for damages, the appellant prays in his complaint that the premises be reconveyed to him. Section 5-203, Idaho Code, provides as follows:

“Action to recover realty.—No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question within five years before the commencement of the action; and this section includes possessory rights to lands and mining claims.”

As urged by the appellee before the lower court (T.R. 64-65, page 16-17 of Reporter's Transcript), the appellant has not alleged compliance with the substantive elements of Section 5-203, Idaho Code, it being incumbent upon him to do so. Thus the complaint fails to state a claim upon which relief can be granted, and its dismissal by the court below must be upheld.

V

DISMISSAL OF THE COMPLAINT SHOULD BE UPHELD ON THE FURTHER GROUNDS THAT (a) THE APPELLANT AND HIS PRE-

DECESSOR IN INTEREST HAVE AC-
QUIESCED IN THE POSITION THAT THE
APPELLEE HAS NO DUTY TO MINE, (b)
THE APPELLANT AND HIS PREDECESSOR
HAVE WAIVED ANY CLAIM BASED UPON
A DUTY TO MINE, (c) THE APPELLANT IS
ESTOPPED FROM ASSERTING ANY DUTY
TO MINE.

The appellant's complaint alleged that the appellee, Bradley Mining Company, ceased mining activities upon the claims in question in 1952. Yet the present action was not filed until January, 1965. Some five years after the cessation of mining, on February 19, 1957, counsel for the appellant's predecessor in interest made the following statement at page 39 of the Reporter's Transcript of pre-trial conference in the case of *United Mercury Mines Co. v. Bradley Mining Company*, 259 F.2d 845 (U.S.D.C. for District of Idaho, Southern Division, No. 2854, the record of which has been forwarded to this court for inspection pending disposition of the instant case, T.R. 117):

"I am trying to explain why a good portion of the contention of the defendant is not applicable here because the relationship of lessor and of lessee existed up until 1941. On December 31, 1941, the new contract provided that the title of this property would pass to Bradley. Bradley then owned it. *Under this new agreement as Bradley owned the title to the claims, owned the title to all the minerals that were produced, then it was their property to do with as they saw fit. And this contract of 1941 contains a peculiar provision that Bradley could work this property as, if and when*

it desired. It could let that property stay there forever and not work it. In other words, Bradley not only owned the claims, Bradley owned the minerals, everything that was produced up there. It could do as it saw fit with those things." (Emphasis added)

This statement, made five years after mining operations had ceased, was followed by approximately eight years before this action was commenced.

As urged by the appellee before the lower court (T.R. 97-99, page 17 of Reporter's Transcript), even if the conveyance, Royalty Agreement and Option did not expressly vest sole discretion as to mining in Bradley, the authorities recognize that a person may be barred by acquiescence. This has been particularly recognized in the area of restrictive covenants, which are analogous to the arrangement utilized in the Conveyance, Royalty Agreement and Option. Thus, 21 C.J.S., Covenants, Section 119, states the following:

"Long continued abandonment or acquiescence in violation of a restrictive covenant may forfeit the right of relief for defendant's breach thereof."

Similarly, 14 Am. Jur., Covenants, Conditions and Restrictions, Section 295, states the following:

"The right to enforce a restrictive covenant may be lost by waiver or acquiescence. If the party entitled to the benefit of the covenant in any way by inaction lulls suspicion of his demands to the harm of the other or if there has been actual or passive acquiescence in the performance of the act complained, then equity will ordinarily refuse aid."

The Idaho Supreme Court recognized the doctrine of abandonment by acquiescence in *Smith v. Shinn*, 82 Idaho 141, 350 P.2d 348.

This case is, of course, much stronger than mere acquiescence by silence to a course of conduct. Here we have the statement of the counsel for the appellant's predecessor in interest at the pre-trial conference in 1957:

"It could let that property stay there forever and not work it."

In addition, we have a lapse of time amounting to approximately 12 years from the cessation of mining activities on the claims involved and approximately seven years from completion of the removal of the equipment until the commencement of this suit. Surely, one cannot stand on one position, wait years during which potential damages would escalate, and then assert a right to damages and to a forfeiture upon a position directly contrary to what he has agreed upon and acknowledged. And, surely, he cannot be heard, in prior litigation over the same contract and against the same defendant, to take a position considered advantageous to him in that cause and then years later to take an opposite position because it now appears better for him to argue it the other way. Yet that is exactly what the appellant is trying to do here.

In addition to the acquiescence, which is apparent, the record establishes that the appellant and his predecessor in interest have waived any right to assert a duty by the Bradley Mining Company to mine the claims involved. Again, the court's attention is di-

rected to the statements of the counsel for United Mercury Mines Company at the pre-trial conference in 1957 and to the 12-year lapse of time between the discontinuance of mining operations and the commencement of his suit. 56 Am. Jur., Waiver, Section 24, has this to say about such action:

“One who intentionally relinquishes a known right cannot, without consent of his adversary, reclaim it, for it is well settled that a waiver once made is irrevocable, even in the absence of consideration, or of any change in position of the party in whose favor the waiver operates. A waiver is conclusive on the party waiving and his privies.”

It would be a peculiar and unsatisfactory state of the law if one could stand by for years, expressly tell another that he need not act, and then come forward with a claim based upon the other's inaction.

What has been said with regard to acquiescence and waiver applies to bar the appellant's action under the doctrine of estoppel:

“The doctrine of equitable estoppel is frequently applied to transactions in which it would be unconscionable to permit a person to maintain a position inconsistent with one in which he, or those by whose acts he is bound, has acquiesced. Declarations or conduct which might not of themselves amount to an estoppel may become such by acquiescence.” 19 Am. Jur., Estoppel, Section 62.

Here we have in addition to the long lapse of time, express recognition by counsel for the appellant's predecessor that under the very instrument involved here the appellee did not have to mine.

Again, we ask the simple question—can a person stand by, tell the one with whom he is dealing that he need not act, and then claim a right for a failure to act? Surely the answer must be no. For these reasons, as well as for those discussed above, the complaint was properly dismissed, and the ruling of the lower court must be upheld.

VI

DISMISSAL OF THE COMPLAINT SHOULD BE UPHELD ON THE FURTHER GROUND THAT PRIOR LITIGATION BETWEEN THE APPELLANT'S PREDECESSOR IN INTEREST AND THE APPELLEE IS RES JUDICATA AS TO THIS ACTION, WHICH RAISES MATTERS THAT COULD HAVE BEEN LITIGATED IN THE PRIOR ACTION.

The court's attention has previously been directed to the case of *United Mercury Mines Co. v. Bradley Mining Company*, 259 F.2d 845, which involved the same mining claims, property, and Conveyance, Royalty Agreement and Option that form the subject matter of the present suit, and to the pre-trial conference held on February 19, 1957. The court below rejected the appellee's contention that that action was res judicata as to the present suit in that the complaint here raises matters that could have been litigated in the prior suit. We contend that rejection of that argument was in error, that the present action is barred by the doctrine of res judicata, and that this Court should so find as an additional reason for upholding dismissal of the appellant's complaint.

The authorities are clear that an appellee may support a judgment by anything in the record, even

though it involves insistence upon a contention which the trial court rejected. See 3 Am. Jur., Appeal and Error, Section 866; *United States v. American R.Ex. Co.*, 265 U.S. 425, 68 L. Ed. 1087, 44 S. Ct. 560.

Again, the statements of counsel for the appellant's predecessor, reported at page 39 of the Reporter's Transcript of the 1957 pre-trial conference, are significant:

"I am trying to explain why a good portion of the contention of the defendant is not applicable here because the relationship of lessor and lessee existed up until 1941. On December 31, 1941, the new contract provided that the title of this property would pass to Bradley, Bradley then owned it. Under this new agreement as quick as Bradley owned the title to the claims, owned the title to all the minerals that were produced, then it was their property to do with as they saw fit. *And this contract of 1941 contains a peculiar provision that Bradley could work this property as, if and when it desired. It could let that property stay there forever and not work it. In other words, Bradley not only owned the claims, Bradley owned the minerals, everything that was produced up there. It could do as it saw fit with those things.*" (Emphasis added)

This pre-trial conference occurred some five years after the appellant alleges mining operations ceased on the claims involved in this action. The quoted remarks make it clear that the interpretation and meaning of the terms of the Conveyance, Royalty Agreement and Option were raised in that prior action, and that counsel for the appellant's predeces-

sor recognized the clear and unambiguous meaning of the document. The appellant's efforts to raise this issue now that it has once been present in a case and could have been asserted as a claim should be denied under principles of *res judicata*.

Although the prior case of *United Mercury Mines Co. v. Bradley Mining Company* was filed in 1951, a date prior to the discontinuance of mining by the appellee, it must be emphasized that the pre-trial conference cited above did not occur until 1957, five years after that discontinuance. Barron & Holtzoff, Federal Practice & Procedure, Section 446, points out that an amendment to join the additional claim which had arisen would have been proper at that time:

"Thus the courts, exercising a wide discretion may allow amendments after pleading time, after issue has been joined, after dismissal of the complaint, after pre-trial conference, when trial is about to begin, during the course of trial, after verdict or judgment, and even on appeal or after remand."

The same text sets forth the principle that failure to so amend and include claims that could properly be presented may be barred under principles of *res judicata*:

"No time is prescribed for amendments by leave of court. The question of timeliness rests largely in the court's discretion. *"The judgment may be res judicata not only as to all the issues covered thereby but also as to all that could have been determined if plaintiffs had sought to amend the complaint at the proper time to include another claim for relief.* As a general rule unless the rights

of the adverse party are prejudiced, leave to amend may be allowed at any stage of the case where justice requires." (Emphasis added)

Thus, even though mining ceased after the date of filing that prior action, the issue as to the duty to mine was present prior to and at the time of the pre-trial conference and at the time of trial of that action and, as demonstrated by the remarks of its counsel, was known by the appellant's predecessor to have been present.

The appellant's claim should be barred by *res judicata*, since the construction of the Conveyance, Royalty Agreement and Option was in issue in the prior litigation and since the appellant's claim could have been asserted at that time. Volume 30A, Am. Jr., Judgment, Section 371, states the following:

"It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim or demand, as the earlier action. In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief. "If the

existence, validity, or construction of a contract or other obligation has been adjudicated in an action, it is *res judicata* when it comes again in issue in another action between the same parties, though the immediate subject of the two actions is different."

Volume 30A, Am. Jur., Judgments, Section 372, continues as follows:

"The phase of the doctrine of *res judicata* precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the question involved in the prior action; the conclusiveness of the judgment in such cases extends not only to matters actually determined, but also to other matters which could properly have been determined in the prior action. *This rule applies to every question falling within the purview of the original action, in respect to matters of both claim and defense which could have been presented by the exercise of due diligence.*" (Emphasis added)

The rule has been recognized by the Idaho Supreme Court in cases such as *Gibbs v. Claar*, 59 Idaho 763, 87 P.2d 471, and *Tingwall v. King Hill Irrigation District*, 66 Idaho 76, 155 P.2d 605.

For purposes of *res judicata*, the appellant in this action is bound by the actions of his predecessor in interest, United Mercury Mines Company. 30 Am. Jur., Judgments, Section 395-399. United Mercury Mines Company litigated the obligation under the Conveyance, Royalty Agreement and Option involved in this case. It raised the issue of the duty to mine,

stating that there was none. It could have amended and asserted a claim for failure to mine—but it did not. Since the issue was present in that case, and since the claim could have been asserted, the appellant's claim in this action should be barred on the grounds of *res judicata*. Thus the dismissal of the complaint by the court below must be upheld.

CONCLUSION

In short, what we have here is an attempt by the appellant:

1. To have the court rewrite a contract negotiated by and satisfactory to his predecessor in interest, but which he doesn't like, to insert therein an implied covenant directly contrary to the express written agreement of the parties;

2. To disregard the express provision that the appellee shall have sole discretion as to if, when and how to mine and to substitute therefor his own discretion;

3. To reverse the position taken by his predecessor in interest in previous litigation between the parties upon the same written contract and to litigate now in a new action what was clearly in issue then; and

4. To do all of this some seven to twelve years after the cause of action, if any, arose, despite the fact that Idaho law requires an action upon a written contract to be brought within five years.

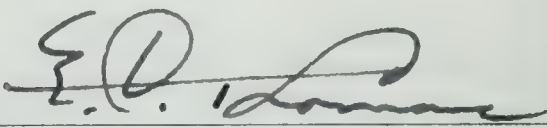
The appellant's appeal is patently without merit. The cases are clear that where the parties have ex-

pressly agreed that one shall have sole discretion as to if, when and how to do something, there can be no implied provision to the contrary and, absent a showing of bad faith amounting to fraud, the other party may not be heard to substitute his own discretion therefor. The appellant here not only expressly agreed, upon abundantly adequate consideration, that the appellee should have sole discretion as to when to mine, he has further agreed that failure to mine should not defeat the conveyance. He cannot now be heard to say the agreement should have been different. It is likewise clear that the appellant's claim is barred by the Idaho statute of limitations, that he is barred by the doctrine of *res judicata* from asserting a claim that was present in prior litigation between the parties, and that he is further barred by the doctrines of acquiescence, waiver and estoppel.

The district court, fully aware of the Idaho law, as well as the peculiar problems and practicalities of the mining community, properly found that the appellant's complaint should be dismissed as failing to state a cause of action. For all the reasons asserted above, that decision must be affirmed.

Respectfully submitted,

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By 
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Attorneys for Appellee

CERTIFICATE

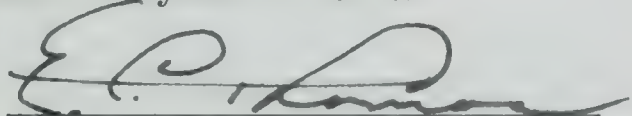
I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Of attorneys for appellee

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of April, 1966, I served three copies of the foregoing BRIEF OF APPELLEE upon CLEMONS, SKILES & GREEN, attorneys for appellant, by depositing said copies thereof in the United States mail, postage prepaid, in an envelope addressed to said attorneys at 1110 Bank of Idaho Building, Boise, Idaho, which address is the last address of the attorneys known to me.



Attorney for Appellee

No. 20620 14 1967

In the
**United States Court of Appeals
For the Ninth Circuit**

HARLOW H. OBERBILLIG, as administrator
of the Estate of J. J. Oberbillig,

Appellant,

vs.

BRADLEY MINING COMPANY,

Appellee.

APPELLANT'S REPLY BRIEF

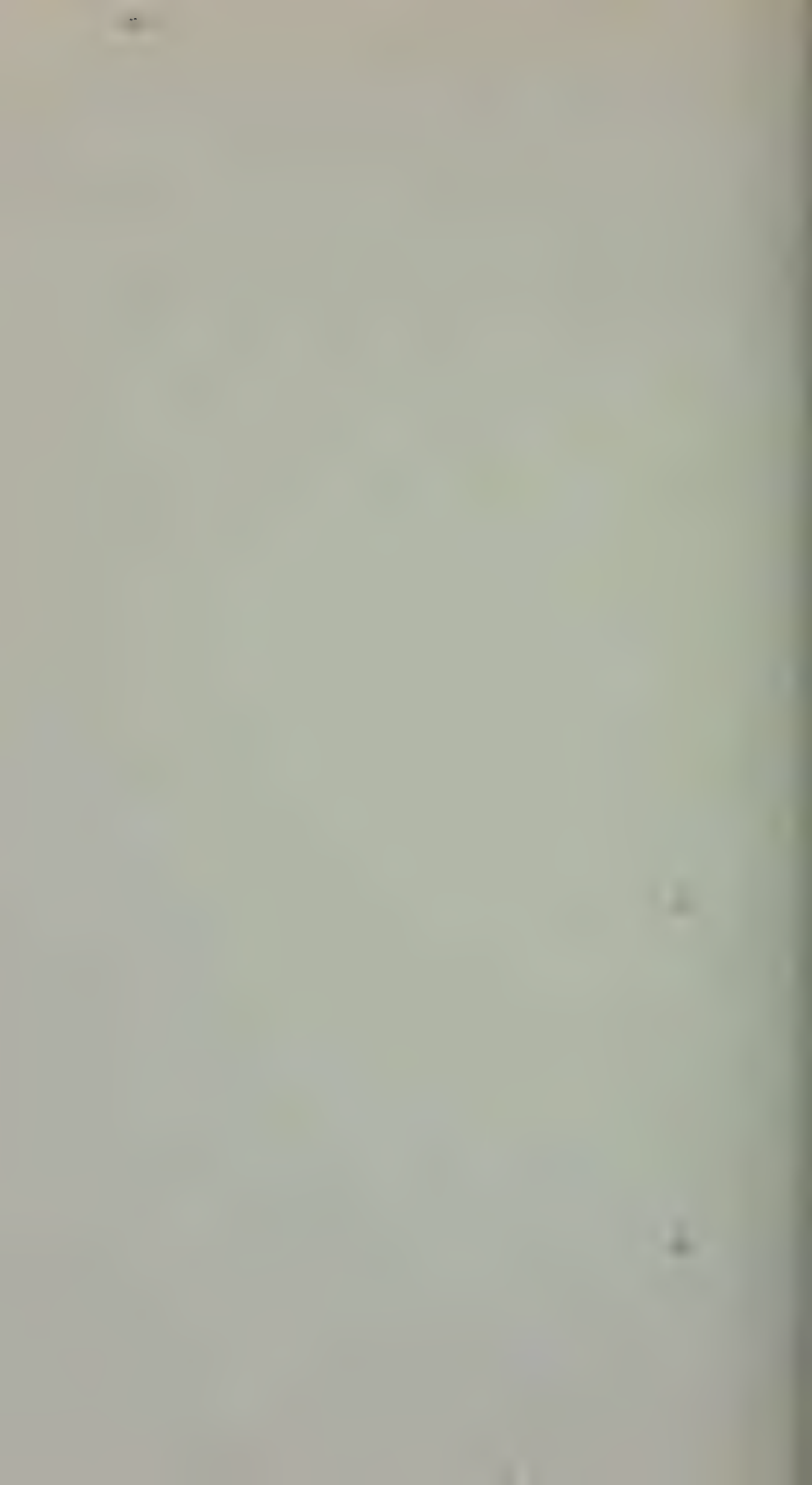
*On Appeal from the District Court of the
United States for the District of Idaho,
Southern Division*

FILED

MAY 17 1966

WM. B. LUCK, CLERK

CLEMONS, SKILES & GREEN
Counsel for Appellant
Res: Boise, Idaho



No. 20620

In the
**United States Court of Appeals
For the Ninth Circuit**

HARLOW H. OBERBILLIG, as administrator
of the Estate of J. J. Oberbillig,

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APPELLANT'S REPLY BRIEF

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CLEMONS, SKILES & GREEN

Counsel for Appellant

Res: Boise, Idaho

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APPELLANT'S REPLY BRIEF

We submit that appellants' initial brief covers the points argued under subdivisions I, II and III of Appellee's brief. Appellant will confine this reply brief to the balance of appellee's brief.

I.

SECTION 5-203, IDAHO CODE

Section 5-203, Idaho Code, is not in point in this case. That section has to do with actions in the nature of adverse possession, or, in other words, actions wherein the right of possession is in question. This action is

based upon the contract between appellant and respondent.

In *Trask v. Success Min. Co.*, 28 Idaho 483, 155 P. 288, it was held that where the grantor conveyed land to the grantee, and the grantor stayed in possession the grantor

“* * * will be regarded as holding the premises in subserviency to the grantee, and nothing short of an explicit disclaimer or a notorious assertion of right in itself would be sufficient to change the character of its possession * * *”

This is an action where appellee has held possession under a conveyance whereby it was agreed that, as consideration thereof, appellee would pay certain royalties to appellant. Appellee has had the right of possession, but its right of possession should be subservient to the rights of appellant should appellee breach the contract. It would be a strange and unrealistic rule if it was the law that a mortgagee holding a 20-year mortgage could not foreclose upon default in the 15th year for the reason that he had not held possession within 5 years.

II.

WAIVER

In *United States v. Chichester*, 9th Circuit, 312 F. 2d 275, on page 282 the court said:

“‘Waiver’ is generally defined as ‘an intentional relinquishment of a known right’ * * *”

and on page 283, after reviewing authorities the court held:

“From our review of the decisions, and assuming without deciding that other elements absent from

this case need not be present, we are satisfied that as minimum requirements to constitute an implied waiver of substantial rights, the conduct relied upon must be clear, decisive and unequivocal showing a purpose to waive the legal rights involved before such conduct constitutes a waiver."

And in *Pacific States Corporation v. Hall* (CCA 9th Cal) 166 F. 2d 668 (emphasis supplied) ;

"The appellees rely on the fact that the statements issued by the Citizens Bank, then trustee, to appellees, did not list as due the interest herein claimed, and such statements, the appellees claim, were accepted by them as correct. *There is no evidence that appellees changed their position in any way in reliance on such statements, nor was any agreement concluded which absolved the debtor from his liability to pay interest.* The mere fact that interest was not listed in the statements, either because of some oversight or because the indebtedness at that time appeared to be far greater than the creditor could reasonably expect to recover from appellees, does not constitute a waiver of the right to claim such interest. *Thompson v. Garner*, 104 Cal. 168, 37 P. 900, 43 Am. St. Rep. 81. Appellees contend that consideration is not always a requisite for waiver, but *it is generally held that where substantial rights are involved, a waiver must be supported by a consideration to be valid.* 56 Am. Jur. Sec. 16, p. 117. At any rate, waiver consists of a voluntary and intentional relinquishment of a known right; and to prove a case of implied waiver of a legal right, as appellees here attempt to do, *there must be a clear, unequivocal and decisive act of the creditor showing a purpose to abandon or waive the legal right,*

or acts amounting to an estoppel on his part. (citing cases) No such intent, or course of conduct on the part of appellant appears.”

In *Union Central Life Insurance Co. v. Schulz*, 45 Idaho 185, 261 P. 235, the contention was made that as plaintiff did not exercise its option to declare the entire note and mortgage due upon the first default of payment of interest that the plaintiff waived its right. The Idaho court held this to be a continuing obligation, citing *Coeur d'Alene v. Spokane, etc. R.R. Co.*, 31 Idaho 160, 169 P. 930, and the court saying:

“The allegations of the complaint show that the appellants had made default in payment of interest installments to the prejudice of the respondent, and were continuing so to do up to the time the respondent brought the action. We conclude that the right of the respondent to exercise its option to declare the whole debt due continued as long as the default continued, and was not waived by mere delay, * * *”

It is universally held that waiver (1) is a matter of intention; (2) that the conduct evidencing such intention be inconsistent with any other theory, (3) that such conduct has induced the other to act to his trouble and expense. *Raney v. Millowners Mut. Fire Ins. Co.*, 141 Kans. 825, 44 P. 2d 285; *Universal Gas Co. v. Central Illinois Pub. Serv. Co.*, 102 F. 2d 164; *Linnard v. Sonnenschein* 94 Cal. App. 729, 272 P. 2d 315; *Phoenix Ins. Co. v. Heath* 90 Utah 187, 61 P. 2d 308, 106 A.L.R. 1391.

Appellant did nothing to convey to appellee any understanding that appellant intended to abandon its rights to the payment of royalties, which were the consideration for the transfer of the mining claims to

appellee. Appellee did not in any way change its position by reason of any act or inaction of appellant. There was no consideration to appellant to uphold a waiver of appellants substantial rights, nor did appellee incur any trouble or expense by reason of any act or inaction on the part of appellant.

In 1955, 1957, 1960 and 1963, appellee reconveyed a total of 465 claims to appellants. True, the claims so reconveyed were unpatented claims, and appellee retained the heart of the mining property, but this was the decision of appellee solely, and not at the suggestion of appellant. In other words the actions of the appellee led appellant to believe that appellee intended to, and would reconvey *all* of the mining claims to appellant. This is the reverse of appellee's claim of waiver.

III.

RES JUDICATA

Appellee cites United Mercury Mines Co. v. Bradley Mining Co., 259 F. 2d 845, and argues that as it involved the same contract and mining properties it should be considered here as *res judiacta*. In that case, in the first paragraph of the decision, this court said:

“* * * This agreement covers certain mining claims in Idaho. The crux of the dispute concerns the method of computing royalties on minerals and ores extracted from mining claims * * *”

The prior action was a case determining which of several different clauses defining royalties was applicable. The cause of action in that case and the cause of action here have no relation even though they arise out of the same agreement. It is universally held that the

doctrine of res judicata applies only when the same cause of action is sought to be relitigated. *State v. California Packing Corporation* (Utah) 145 P. 2d 784; *Keidatz v. Albany* (Cal) 249 P. 2d 264; *Wilson v. Lowry* (Arizona) 52 P. 777; *Heyman Cohen & Sons v. M. Lurie Wollen Company*, 232 N.Y. 112, 133 N.E. 370.

To evade this rule, appellee argues that the complaint in the prior case could have been amended and that the doctrine of res judicata extends to all "issues" "that could have been determined if plaintiffs had sought to amend." "Issues" and causes of action are not the same. The cause of action here is foreign to the cause in the prior case.

"Amendment" relates to an issue in the same cause of action. Amendment of a pleading does not permit an entirely new cause of action.

The general rule is stated in 71 C.J.S., Pleadings, Sec. 275, p. 580:

"The term 'amendment' as applied to pleadings has been defined as the correction of some error or mistake in a pleading already before the court. * * *

and in 71 C.J.S., Pleadings, Sec. 290, p. 642:

"In the absence of statutory authorization, and in many jurisdictions because of express statutory restrictions, the generally accepted rule is that an amendment may not be permitted which sets up a new and distinct cause of action, or which substantially changes the claim or demand, or cause of action, set out in the original pleadings, or which changes the issues involved in the original action."

In *Knox v. Atchison T. & S. F. Ry Co.*, (Cal) 214 P. 2d 589, it was held that amendments to conform to the

evidence should not be allowed where they raise new issues.

In *Superior Manufacturing Corporation v. Hessler Manufacturing Company*, 267 F. 2d 302, the court, said:

“An amended pleading is one which clarifies or amplifies a cause of action which can be identified with certainty as the same cause of action originally pleaded or attempted to be pleaded. It is a perfection of an original pleading rather than the establishment of a new cause of action, and the imperfect pleading of jurisdictional facts does not deprive the court of jurisdiction as of the time the action is filed, if such defect be later corrected. * * *”

Respectfully submitted,

CLEMONS, SKILES & GREEN

By C. STANLEY SKILES

Attorneys for Appellant,

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Boise, Idaho

CERTIFICATE

We certify that in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

CLEMONS, SKILES & GREEN

By _____

Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of May, 1966, I served three copies of the foregoing BRIEF OF APPELLANT upon MOFFATT, THOMAS, BARRETT & BLANTON, attorneys for appellee.

Attorney for Appellant

No. 20621 ✓ FEB 14 1967

In the
United States Court of Appeals
For the Ninth Circuit

JOHN M. ROGERS and JOHN M. ROGERS,
Executor of the Estate of Gladys B.
Rogers, deceased,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petitioners' Opening Brief

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No. 20621

In the

United States Court of Appeals

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JOHN M. ROGERS and JOHN M. ROGERS,
Executor of the Estate of Gladys B.
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Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petitioners' Opening Brief

I.

JURISDICTIONAL STATEMENT

Jurisdiction of the Tax Court in this proceeding is based on Internal Revenue Code of 1954, sections 7442 and 6213(a). Petitioners John M. Rogers and Gladys B. Rogers during the years in question, 1957 and 1958, resided at 2183 Danville Highway, Walnut Creek, California. Petitioner John M. Rogers currently resides at that address. Petitioners' joint return for 1958 was filed with the Director of Internal Revenue at San Francisco, California. The notice of deficiency for that year was mailed to petitioners on June 28, 1963, and petitioners' Petition was filed in the Tax

Court on August 19, 1963, within 90 days of the mailing of the notice of deficiency.

Jurisdiction of this Court is based upon Internal Revenue Code of 1954, section 7482, the appeal being from a decision of the Tax Court entered on July 26, 1965. The Petition for Review was filed on October 18, 1965, within three months after the decision was rendered, as required by Internal Revenue Code of 1954, section 7483. The Petition for Review was in the form prescribed by Rule 29, Rules of the United States Court of Appeals for the Ninth Circuit and a copy of the Petition for Review, together with a Notice of Filing Petition for Review, was served on the respondent, as required by said Rule 29. The petitioners filed their joint return for 1958 with the office of the Director of Internal Revenue at San Francisco, California, which office is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. Venue in this Court is proper under Internal Revenue Code of 1954, section 7482(b).

II.

STATEMENT OF THE CASE

The instant case arises from certain transactions occurring during the years 1957 and 1958 whereby petitioners exchanged certain real property located at 571 Market Street, San Francisco, California, owned and held by them for investment, for like investment property, being an office building hereinafter referred to as the "Sharon Building." Petitioners reported the transaction in question on their joint Federal Income Tax Return for the calendar year 1958 as a tax-free exchange of like property under the provisions of section 1031(a) of the Internal Revenue Code of 1954.*

*Section 1031 provides as follows:

(a) *Nonrecognition of Gain or loss from Exchanges Solely in Kind.*—No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including

Respondent characterized this exchange as a sale of 571 Market Street, followed by a purchase of the Sharon Building, and determined a deficiency in tax on the ground that petitioners had sold 571 Market Street and realized long-term capital gain as a result thereof. The Tax Court, Atkins, J., upheld respondent's position.

A. Statement of Facts

The following uncontradicted facts are contained in the Stipulation of Facts entered into between the parties on June 17, 1964 (C.T. 18-27), the Findings of Fact of the Tax Court herein (C.T. 145-156), and the oral testimony and documentary evidence presented at trial.*

1. Petitioners before the Tax Court were John M. Rogers and his wife, Gladys B. Rogers, now deceased. John M. Rogers, Executor of the Estate of Gladys B. Rogers, has been substituted as a proper party in place of said Gladys B. Rogers. As used herein, the term "petitioners" will refer jointly to John M. Rogers and Gladys B. Rogers.

2. Petitioners resided at Walnut Creek, California. They filed joint Federal income tax returns on the cash method

stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates or trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment.

(b) *Gain From Exchanges Not Solely in Kind*. If an exchange would be within the provisions of subsection (a) * * * if it were not for the fact that the property received in exchange consists not only of property permitted by such provisions to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

*References to the Clerk's Transcript (Volumes A and B of the Record) will be cited "C.T.," and references to the Reporter's Transcript (Volume II of the Record) will be cited "R.T."

for the taxable years 1958, 1959 and 1960 with the District Director of Internal Revenue, San Francisco, California. (C.T. 145; Exh. 1-A, 2-B, 3-C, C.T. 28, 49, 62).

3. Late in 1955 petitioner John M. Rogers retired from his position as an executive of a large international engineering construction organization and thereafter was concerned with securing investment income. In April 1956, petitioners acquired for investment an office building situated at 571 Market Street, San Francisco, California, and thereafter held such property for the income derived from rents and profits. Coldwell, Banker & Company, a San Francisco real estate firm, performed for a fee the various duties associated with the management of the building. (C.T. 145-146).

4. The Standard Oil Company of California (hereinafter referred to as Standard Oil) desired to acquire five adjoining properties, including 571 Market Street, as the site for a proposed new office building, and prior to August 22, 1957, commissioned Buckbee Thorne & Co., a San Francisco real estate firm (hereinafter referred to as Buckbee Thorne) to negotiate for the purchase of such five properties on behalf of Standard Oil as undisclosed principal. Since Standard Oil wished to remain an undisclosed principal until all five properties had been assembled, Buckbee Thorne, with the authorization of Standard Oil, named California Pacific Title Insurance Company (hereinafter referred to as Cal Pac) to acquire title for its principal. (C.T. 146).

5. During August 1957, petitioners were approached by a representative of Buckbee Thorne who desired to obtain an option to purchase 571 Market Street. They advised such representative that they would sell for a price of \$750,000, plus the real estate commission, and on August

13, 1957, an escrow account (numbered 462011) was opened at Cal Pac under the name "Buckbee Thorne—Rogers." (C.T. 146).

6. On August 22, 1957, petitioners granted to Cal Pac an option to purchase 571 Market Street. The option agreement provides in pertinent part as follows:

For and in consideration of the sum of SEVEN THOUSAND SEVEN HUNDRED AND TWELVE AND 50/100 (\$7,712.50) Dollars to seller in hand paid, the receipt of which is hereby acknowledged by said seller, to apply on the purchase price, the undersigned JOHN M. ROGERS and GLADYS B. ROGERS herein designated as the seller, hereby grants the right and option to purchase and agrees to sell to CALIFORNIA PACIFIC TITLE INSURANCE COMPANY herein designated as the purchaser, or its assigns, at any time within 120 days from the date hereof, the following described property in the City and County of San Francisco, State of California, to wit:

[here follows description of 571 Market Street]

For the purchase price of SEVEN HUNDRED SEVENTY ONE THOUSAND TWO HUNDRED FIFTY AND 00/100 (\$771,250.00) Dollars lawful money of the United States of America, payable as follows: CASH

* * * * *

If said purchaser elects to purchase said property at the price and on the terms herein set forth, and within the time specified, the said purchaser shall give said seller due notice in writing and shall pay an additional sum of \$69,412.50 for account of said seller to Buckbee Thorne & Co. * * * said sum to apply on the purchase price, whereupon thirty (30) days after the exercising of this option shall be allowed said purchaser to examine title to said property and report any valid objection thereto, if any, to said seller. If no such objection to title is reported, the balance of the purchase price shall be paid by said purchaser at or

before the expiration of said time and said seller shall thereupon deliver a properly executed and acknowledged grant deed to said property. (C.T. 146-147; Exh. 4-D, C.T. 75).

7. By letter dated August 30, 1957, Buckbee Thorne transmitted to Cal Pac the option granted by petitioners to Cal Pac, as well as options for the other properties Standard Oil was seeking to acquire. (C.T. 147; Exh. 6-F, C.T. 78).

8. Petitioners then advised Coldwell, Banker & Co., as managers of their property, that they had granted an option for the purchase of 571 Market Street. (C.T. 147).

9. In mid-September 1957, petitioners were approached by Coldwell, Banker & Co., acting as agents for the owners (hereinafter called the "Sharons") of an office building known as the Sharon Building, with the suggestion that the Sharon Building might be purchased for \$1,200,000, and that the proceeds from the sale of 571 Market Street might be used for such purpose. Prior to that time, petitioners were not aware that the Sharon Building was for sale. They advised Coldwell, Banker & Co. at that time that they were not interested in buying another piece of property, but rather that they intended to invest the proceeds from the sale of 571 Market Street in high grade stock. Coldwell, Banker & Co. then suggested that if they did not wish to purchase the Sharon Building, an advantageous exchange of 571 Market Street for the Sharon Building could be made and that petitioners would receive a return on their investment which would be substantial and comparable to that which they were then receiving. Petitioners, after consulting with counsel, proposed an exchange in which the Sharon Building would be valued at \$1,050,000 and 571 Market Street would be valued at its then option

price of \$771,250. This proposal was rejected, but the Sharons countered with an offer to value the Sharon Building at \$1,150,000 for purposes of such an exchange, to which proposal petitioners agreed. (C.T. 147-148; R.T. 25-27).

10. Petitioners executed a document prepared by Coldwell, Banker & Co. entitled "Agreement to Exchange", dated December 2, 1957. Therein it was recited that they agreed to exchange 571 Market Street for the Sharon Building. It was further provided therein that 571 Market Street should be transferred subject to existing leases and "subject to existing option to sell, which obligation is to be assumed by the owners" of the Sharon Building. It was therein further provided that coincident with the exchange of deeds to the two properties, petitioners agreed to pay the owners of the Sharon Building \$400,000 in cash. (C.T. 148-149; R.T. 29; Exh. 39, C.T. 142).

11. Petitioners at all times considered themselves bound by the Agreement to Exchange and were at all times prepared to exchange with the Sharons. (R.T. 50, 51).

12. On December 6, 1957, petitioners left the Agreement, as executed by them, with Coldwell, Banker & Co. On the same date an escrow account (numbered 463529) was opened at Cal Pac under the name "Sharon—Coldwell, Banker & Co." (C.T. 149; R.T. 29).

13. On December 9, 1957, petitioner John M. Rogers sent a letter to Cal Pac advising that he had entered into an agreement with the Sharons to exchange 571 Market Street, subject to the outstanding option, for the Sharon Building. (C.T. 149; Exh. 8-H, C.T. 80).

14. On December 9, 1957, Cal Pac issued a preliminary title report concerning the Sharon Building and delivered it to petitioners. (C.T. 149; Exh. 9-I, C.T. 82).

15. On December 16, 1957, petitioner John M. Rogers delivered to Cal Pac his check for \$7,712.50, which amount equalled the consideration previously paid to him and his wife for the option granted by them on August 22, 1957. The receipt given by Cal Pac for such amount stated that such sum was to be applied on an exchange proration statement to be supplied by Coldwell, Banker & Co. (C.T. 150; Exh. 11-K, C.T. 85).

16. On December 16, 1957, petitioners delivered to Cal Pac a deed conveying 571 Market Street to Cal Pac. At the same time petitioners gave written escrow instructions to Cal Pac "to deliver said deed to the order of Hurford C. Sharon, et al.," at such time as Cal Pac had vested title to the Sharon Building in petitioners, and had carried out petitioners' further instructions not pertinent hereto. (C.T. 150; Exh. 12-L, 13-M, C.T. 86, 87).

17. On December 16, 1957, Buckbee Thorne notified Cal Pac that thereafter Standard Oil would issue instructions to Cal Pac regarding the options. (C.T. 149; Exh. 10-J, C.T. 84).

18. On December 18, 1957, Standard Oil delivered a letter of escrow instructions authorizing and directing Cal Pac to record on December 18, 1957, the five options (including the option on 571 Market Street), to exercise such options on December 19, 1957, by sending notices to the respective property owners in care of Buckbee Thorne, to take title to the properties in its (Cal Pac's) name, and then convey the five parcels of property to Standard Oil in one grant deed. Therein Standard Oil stated that it would at the same time deliver to Buckbee Thorne for the account of the respective owners the amounts required to be paid upon the exercise of the options and that it would issue to Cal Pac a check for \$2,344,537.50 to cover the remaining purchase price of all the five properties. (C.T. 150-151; Exh. 14-N, C.T. 89).

19. On December 19, 1957, Hurford C. Sharon, one of the twelve owners of the Sharon building, executed a grant deed conveying his interest in the Sharon Building to petitioners. (Exh. 20-T, C.T. 102). The remaining deeds to the Sharon Building were executed between December 19, 1957 and January 8, 1958. (C.T. 152).

20. On December 19, 1957, Cal Pac sent a letter, dated December 13, 1957, to Buckbee Thorne, giving notice of the exercise of the option on 571 Market Street. At the same time Cal Pac gave its check in the amount of \$69,412.50 to Buckbee Thorne for the account of petitioners, and furnished Buckbee Thorne a copy of the previously mentioned letter of December 9, 1957, sent by petitioners to Cal Pac with regard to petitioners' execution of the Agreement to Exchange. On the same date, Standard Oil delivered to Cal Pac its check for \$2,344,537.50 (C.T. 151; Exh. 15-O, 16-P, C.T. 97, 98).

21. On December 20, 1957, petitioners learned for the first time that the outstanding option was being exercised. (R.T. 35, 39). On that date, Buckbee Thorne notified petitioners by telephone that the option had been exercised and that it had received from Cal Pac its check for \$69,412.50. On the same date, Buckbee Thorne addressed a letter to petitioners containing the same information and stating that Cal Pac had requested that the check be returned to it to be held by it in connection with an exchange of 571 Market Street for the Sharon Building. Therein Buckbee Thorne requested petitioners' approval to pay over the \$69,412.50 to Cal Pac for such purpose. On a copy of such letter, petitioners on December 23, 1957, acknowledged receipt of notice of the exercise of the option and approved the payment of the \$69,412.50 to Cal Pac. Accordingly, on the same day, Buckbee Thorne endorsed the check and returned it to Cal Pac (C.T. 151-152; Exh. 17-Q, 18-R, 19-S, C.T. 99, 100, 101).

22. On January 16, 1958, the deeds to the Sharon Building from the various owners thereof were delivered to Cal Pac. These deeds were enclosed in a letter of escrow instructions by Hurford C. Sharon, acting as agent for the Sharons, wherein Cal Pac was authorized to deliver the deeds to petitioners when Cal Pac had received \$1,150,000 for the account of the Sharons. Such letter also contained the following:

It is understood that \$400,000.00 of such sum is to be received by you from the Rogers and \$750,000.00 is to be received by you from a purchaser of [description of 571 Market Street], which property is hereinafter referred to as the "Exchange Property." It is understood that Rogers will convey to you on behalf of the Owners [Sharon interests], the Exchange Property, in addition to the payment of said sum of \$400,000.00. You are hereby authorized to execute a deed of the Exchange Property on behalf of the owners [Sharons] conveying said property to Standard Oil Company of California, the present holder of an option to purchase the Exchange Property, or its order, and you are further authorized to deliver said deed to said grantee when you hold said sum of \$750,000.00 heretofore mentioned for the account of the Owners [Sharons]. (C.T. 152; Exh. 20-T, 21-U, C.T. 102, 104).

23. On the same date the above instructions were amended to authorize the delivery of the deeds to petitioners upon the receipt by Cal Pac for the account of the Sharons of \$1,118,750 (\$368,750 from petitioners, and \$750,000 from Standard Oil), instead of \$1,150,000, the difference of \$31,250 representing commission of Coldwell, Banker & Co. for arranging the transaction. On the same date Hurford C. Sharon issued supplemental instructions to Cal Pac to release the sum of \$21,250 out of funds deposited by Standard Oil to satisfy the demand of Buckbee

Thorne, and also to prorate rent and insurance credited on the Market Street property and pay it to the ultimate purchaser, Standard Oil. (C.T. 153; Exh. 22-V, 23-W, C.T. 109, 111).

24. On January 16, 1958, Cal Pac recorded the deeds transferring the Sharon Building to petitioners, and petitioners' deed conveying 571 Market Street to Cal Pac. On the same date, petitioners notified the tenant of 571 Market Street to pay all future rentals to Cal Pac. (C.T. 153; Exh. 33-GG, C.T. 134).

25. On January 20, 1958, Cal Pac sent to the manager of the office buildings department of Standard Oil a letter in which it was stated that on January 16, 1958, it had recorded, for the account of Standard Oil, the deed from petitioners to Cal Pac covering 571 Market Street. (C.T. 153-154; Exh. 34-HH, C.T. 135).

26. On January 29, 1958, Cal Pac sent a letter to Coldwell, Banker & Co. stating that the Sharon Building was acquired by petitioners "in consideration of the sum of \$400,000.00 and the exchange of Market Street property, which was sold in the same transaction, for a consideration of \$750,000.00." (C.T. 154; Exh. 35-II, C.T. 138).

27. On January 31, 1958, Cal Pac executed one grant deed conveying to Standard Oil the five parcels of property, including 571 Market Street, and such deed was recorded on that date. On the same date, Cal Pac assigned the lease of 571 Market Street to Standard Oil, and notified the tenant to pay all future rentals to Standard Oil. (C.T. 154; Exh. 36-JJ, C.T. 139).

28. Petitioners had collected the rental on 571 Market Street for the full month of January 1958 in the amount of \$4,583.33. Of this amount they retained \$2,291.67, representing the amount allocable to the period from January 1

to January 16. The remainder was not received by the Sharon interests, but was paid to Standard Oil. (C.T. 154).

29. After petitioners acquired the Sharon Building, they held it for the income derived from rents and profits. (C.T. 154).

30. On their Federal income tax return for the taxable year 1958, petitioners reported the above transaction as an exchange involving unrecognized gain.

In the notice of deficiency respondent determined that gain should be recognized, stating:

It is determined that you realized a long-term capital gain in the amount of \$439,265.85 resulting from the sale of the real estate known as 571 Market Street, San Francisco, California. Such gain is taken into account to the extent of 50%, or \$219,632.92, in computing taxable income. The gain is computed as follows:

Sales price	\$771,250.00
Expense of sale	22,100.65
Net	<u>\$749,149.35</u>
Basis per return	309,883.50
Gain on sale	<u>\$439,265.85</u>
(C.T. 155-156).	

31. The Tax Court, Atkins, J., found that petitioners sold 571 Market Street to Standard Oil and purchased the Sharon Building with the proceeds thereof, and that by reason of such sale and purchase, petitioners did not effect an exchange within the meaning of Internal Revenue Code, section 1031(a). (C.T. 157-164).

B. Questions Presented

The following questions are presented for determination by this Court:

1. Did petitioners effect a direct exchange of 571 Market Street for the Sharon Building, notwithstanding the exist-

ence and the exercise of the option granted by petitioners to Cal Pac to purchase 571 Market Street?

2. Assuming that petitioners sold 571 Market Street to Standard Oil and simultaneously purchased the Sharon Building with the intent to effect an exchange, does such transaction qualify as an exchange under section 1031(a) of the Internal Revenue Code?

III.

SPECIFICATION OF ERRORS

A. The Tax Court erred in finding that petitioners did not exchange 571 Market Street for the Sharon Building. (C.T. 161-162).

B. The Tax Court erred in finding that petitioners sold 571 Market Street to Standard Oil and purchased the Sharon Building from the proceeds thereof. (C.T. 162-163).

C. The Tax Court erred in determining that the instant transaction failed to qualify as an exchange under section 1031(a) of the Internal Revenue Code. (C.T. 164).

IV.

ARGUMENT

A. Introduction

From the Statement of Facts set forth at Part IIA hereof, the following conclusions are apparent:

1) Petitioners *intended* to effect an exchange with the Sharons;

2) Likewise, the Sharons *intended* to effect such an exchange;

3) The escrow transactions and instructions took the *form* of an exchange;

4) Petitioners never *owned, used or enjoyed* the monies deposited in escrow by Standard Oil (the "proceeds" of the alleged "sale"); and

5) The *substance* of these transactions was that in net effect an exchange had been consummated.

Thus, whether these transactions be examined from the standpoint of either form, substance, intent of the parties, net effect, or underlying statutory purpose to tax only gain in the popular or economic sense, it is apparent that the Tax Court has reached an incorrect and unjust decision, based upon faulty premises. An examination of the premises upon which this decision was based readily supports this conclusion.

In brief, the Tax Court based its decision upon these two premises:

1) Petitioners did not exchange 571 Market Street for the Sharon Building; instead, petitioners sold 571 Market Street to Standard Oil and used the proceeds therefrom to purchase the Sharon Building. (C.T. 161-163).

2) Internal Revenue Code, section 1031(a) applies only to "direct exchange" situations and not to the sale and simultaneous purchase of like property. (C.T. 158).

Petitioners submit that both of these premises are erroneous and that such error affords petitioners two independent grounds for reversal of the Tax Court's decision herein.

B. Petitioners Directly Exchanged 571 Market Street for the Sharon Building

Petitioners submit that the uncontroverted facts in this case prove that petitioners directly exchanged 571 Market Street for the Sharon Building.*

*Further reference to the facts in this case will be made by reference to specific numbered paragraphs in petitioners' Statement of Facts, *supra*, e.g. "S.F.".

First of all, it is clear that both petitioners and the Sharons *intended* to effect such an exchange. The negotiations between petitioners and the Sharons which resulted in petitioners' execution of the Agreement to Exchange were conducted for the express purpose of arranging for the exchange of petitioners' property for the Sharon Building. (S.F. 9).

The Agreement itself establishes a clear intent to effect such an exchange. The Agreement was prepared by Coldwell Banker & Co., acting as agent for the Sharons, and reduced to writing the Sharons' offer to exchange their property for petitioners' property on the basis of a valuation of \$1,150,000 for the Sharon Building. (S.F. 9, 10).

This Agreement expressly provided for such an exchange (S.F. 10), and petitioners at all times thereafter considered themselves fully bound by the Agreement and were fully prepared to consummate the exchange. (S.F. 11).

At the times when these negotiations took place and petitioners executed the Agreement, the outstanding option to purchase (which was to expire on December 20, 1957) had not been exercised, and petitioners had no knowledge if or when it would be exercised. (S.F. 21). Under California law, an unexercised option to purchase real property neither constitutes a contract of purchase and sale nor does it give the option holder any interest in the property itself (50 Cal. Jur.2d, *Vendor and Purchaser*, sec. 164 at pp. 211-212 [1959]). Therefore, at the time when petitioners executed the Agreement to Exchange with the Sharons, they had every right to do so, the outstanding option was no impediment thereto, and there was no reason for them to believe that the exchange would not be consummated.

Aside from an intent to exchange, both petitioners and the Sharons took immediate steps to effect an exchange. On

December 6, 1957, the same day petitioners executed and returned to Coldwell Banker the Agreement to Exchange, an escrow was opened with respect to the Sharon exchange, and on December 9, petitioners notified Cal Pac, the option holder, of the forthcoming exchange. (S.F. 12, 13). Thereafter, on December 16, petitioners returned the \$7,712.50 option binder to Cal Pac, as escrow holder in the exchange escrow, to be applied to the exchange, and Cal Pac acknowledged that such sum would be so applied. (S.F. 15). On the same day, petitioners delivered to Cal Pac as escrow holder the deed to 571 Market Street, along with escrow instructions which, in pertinent part, authorized delivery of the deed only *to the order of the Sharons*, upon vesting title to the Sharon Building in petitioners. (S.F. 16). Shortly thereafter, on December 19, the Sharons executed the first of the deeds conveying the Sharon Building to petitioners. (S.F. 19). All these events occurred before petitioners learned that Standard Oil had exercised its option to purchase petitioners' property. (S.F. 21).

Both the intent and effect of petitioners' escrow instructions are clear: Petitioners conditioned the transfer of 571 Market Street *to the Sharons* upon vesting title to the Sharon Building in petitioners. Obviously, had petitioners intended to effect a sale, in the event the outstanding option was exercised prior to the consummation of the exchange, petitioners' instructions would have provided in the alternative for the transfer of 571 Market Street to *Cal Pac* on behalf of its undisclosed principal, *Standard Oil*, conditioned upon receipt in escrow of the unpaid purchase price.

In fact, petitioners consistently treated the transaction as an exchange, even after learning that the option had been exercised. Instead of amending their previous escrow instructions to include provision for a sale to *Standard Oil*

and a subsequent purchase of the Sharon Building from the proceeds therefrom, petitioners, on December 23, 1957, simply acknowledged receipt of the notice of exercise of option and confirmed Buckbee Thorne's suggestion that the \$69,412.50 option payment made by Standard Oil be returned to Cal Pac to be held by it in connection with the exchange of property and pending consummation of the exchange. (S.F. 21). Title to such payment remained at all times with Standard Oil, until transferred to the Sharons. 18 Cal.Jur.2d, *Escrows*, sec. 11, at pp. 319-320 (1954).

Moreover, the Sharons' escrow instructions likewise contemplated a direct exchange with petitioners and a simultaneous sale by the Sharons to Standard Oil.

The Sharons' instructions authorized Cal Pac, as their escrow agent, to deliver the deeds to the Sharon Building to petitioners and to convey 571 Market Street to Standard Oil *on behalf of the Sharons*, when Cal Pac received \$1,150,000 for the account of the Sharons, comprised of \$400,000 from petitioners and \$750,000 from Standard Oil. (S.F. 22). Thus the intent and effect of the Sharons' instructions likewise are clear: The Sharons simply combined a two-step transaction into one set of escrow instructions to provide for the exchange of the Sharon Building for 571 Market Street and \$400,000, and the sale of 571 Market Street by them to Standard Oil for \$750,000. Had the Sharons intended merely to effect a *sale* of the Sharon Building to petitioners, these instructions would have simply conditioned the transfer to petitioners of deeds to the Sharon Building upon receipt of the purchase price thereof *from petitioners*, without reference to Standard Oil or the 571 Market Street property.

Thus, both the petitioners and the Sharons, in performance of their original Agreement to Exchange, instructed

Cal Pac, their common escrow agent, to effect a mutual exchange of property, and this was precisely what was done. On January 16, 1958, having received escrow instructions from both parties which provided for an exchange of their respective properties, Cal Pac recorded the deeds transferring the Sharon Building to petitioners and the deed conveying 571 Market Street to Cal Pac. (S.F. 24).

From Standard Oil's viewpoint, its escrow instructions simply authorized Cal Pac to record its various options to purchase, to exercise the same, and to deliver the balance of the purchase prices for the various parcels to the "respective sellers" upon recording deeds to such properties in Standard Oil's name. (S.F. 18). These instructions obviously did not preclude the consummation of the exchange between petitioners and the Sharons. Cal Pac was given full authority from the Sharons to deliver title to 571 Market Street to Standard Oil, upon receipt of the purchase price therefor. Thus Standard Oil's instructions were fully consistent with those of the Sharons and petitioners. In any event, any activities or statements of Standard Oil or its agent Cal Pac in derogation of the agreement between petitioners and the Sharons for an exchange of their property would have had no relevance to the instant question. For as we shall see, neither Standard Oil nor Cal Pac had at any time any rights with respect to 571 Market Street which could have prevented the consummation of the exchange.

The Tax Court's premise that petitioners sold their property to Standard Oil and purchased the Sharon Building from the proceeds of that sale is therefore wholly contrary to the express intention of the parties and utterly ignores what was actually accomplished in the escrow transactions described above. In order to avoid the effect of these escrow transactions, which had every characteristic of an actual,

direct exchange, the court rejected this evidence as constituting "mere formal matters which do not reflect the substance of the transaction." (C.T. 162). The court thus substituted its view of the "substance" of the transaction for the proof afforded by the evidence. This approach might be understandable except for the fact that the evidence also conclusively proved that the substance of the transaction was an exchange. The court dismissed as controlling the fact that the parties intended to effect an exchange and that in substance and net effect an exchange had been effected, on the sole ground that its decision "must be governed by what was actually done, rather than by what might have been done." (C.T. 164). Petitioners hasten to point out that "what might have been done" could only have constituted a mere change in the *form* of the transaction, *e.g.*, by arranging for Standard Oil to acquire the Sharon Building and thereupon to exchange it for petitioners' property, as was done in the *Alderson*, *Coastal Terminals*, and *Mercantile Trust* cases discussed *infra*. The court's decision thus ignores both form and substance and is, we submit, contrary to the evidence in this case and the law applicable thereto.

Apparently, the court's premise that petitioners sold 571 Market Street to Standard Oil was based solely upon the fact that Standard Oil exercised its option to purchase before the exchange with the Sharons could be fully consummated. (C.T. 161-162). The court reasoned that, since Standard Oil exercised its option, Standard Oil became entitled to receive a deed to the property and that it somehow, at some unspecified time, acquired this property from petitioners before petitioners acquired deeds to the Sharon Building. (C.T. 161-162). The short answer to the court's conclusion is simply this: While Standard Oil may have

had a contractual right to receive 571 Market Street upon exercising its option and upon complying with the conditions thereof, the existence of this right did not of itself constitute a sale, and likewise did not in any manner prevent petitioners from transferring 571 Market Street to the Sharons.

In California the law in this regard is quite clear:

Transfer or Assignment by Vendor.—As long as legal title remains in the vendor it may be conveyed by him, and a vendor under an executory contract for the sale of land may sell to a third person the land covered by the contract, at the same time assigning the contract, or he may merely convey the land subject to the prior rights of the purchaser under the contract. 50 Cal.Jur.2d, *Vendor and Purchaser*, sec. 133, at p. 172 (1959).

See also *Bone v. Dwyer*, 89 Cal. App. 535, 541, 265 Pac. 292 (1928); *Day v. Cohn*, 65 Cal. 508, 509-510, 4 Pac. 511 (1884); Ogden, California Real Property Law, sec. 9.8(1), at p. 349 (1956).

Thus, the owner may effect a valid transfer of the property to a third person, and such transfer does not constitute a breach of the original contract if the third person agrees to assume the owner's obligations under that contract:

Conveyance to Third Party Before Time for Performance.—A vendor who has title at the time a contract for the purchase and sale of realty is entered into may divest himself of the ownership of the land during the executory period of the contract. Such a conveyance of the property to a third person before the time for performance is not a breach or ground for rescission, if it is made under such circumstances as to protect the rights of the purchaser. 50 Cal. Jur. 2d, *Vendor and Purchaser*, sec. 306, at pp. 394-395 (1959).

See also, *Heden v. Point Reyes Land Co.*, 185 Cal. 121, 125, 196 Pac. 44 (1921).

Obviously, Standard Oil and its agent Cal Pac recognized these principles, for they fully acquiesced in petitioners' exchange. Even before the time that the notice of exercise of the option was given, Cal Pac as agent for Standard Oil knew that petitioners had entered into an agreement to exchange the subject property with the Sharons and that petitioners had deposited into escrow a deed to such property to the order of the Sharons in furtherance of this agreement. (S.F. 13, 15, 16). Such knowledge clearly was imputed to Standard Oil as principal. 2 Cal. Jur. 2d, *Agency*, sec. 160, at pp. 855-856 (1952); 18 Cal. Jur. 2d, *Escrows*, sec. 16, at pp. 328-330 (1954).

Furthermore, Cal Pac as agent for Standard Oil never looked to petitioners for performance of the option agreement, but instead acknowledged the existence of the Agreement to Exchange, accepted from Buckbee Thorne the \$69,412.50 option payment to be held in escrow pending the exchange, and ultimately recognized that in fact petitioners acquired the Sharon Building in exchange for 571 Market Street, and that 571 Market Street "was sold in the same transaction" to Standard Oil. (S.F. 20, 21, 26).

Thus it is evident that Standard Oil fully accommodated petitioners' intent to effect an exchange with the Sharons, notwithstanding its contractual rights with respect to 571 Market Street. Moreover, as we have previously pointed out, such accommodation was in recognition of the well-established legal principle that the mere existence of a contract of purchase and sale does not effect the validity of a transfer of the property to a third person taking the property subject to that contract.

On the basis of the foregoing authorities and analysis, the Tax Court's holding that petitioners sold their property to Standard Oil is bewildering. The Tax Court admittedly was unable to state *when* such a sale could have occurred. (C.T. 162, note 7). The reason for its difficulty in this regard is simply that under both the law and the facts, no such sale ever occurred.

A "sale" occurs for tax purposes when the purchase price is paid to the vendor and a deed to the property is transferred to the purchaser. *E.g.*, *Newaygo Portland Cement Co.*, 27 B.T.A. 1097, 1104-1105 (1933), *acq.*, XII-1 Cum. Bull. 9, *aff'd*, 77 F.2d 536 (D.C. Cir. 1935); *Lucas v. North Texas Lumber Co.*, 281 U.S. 11 (1930). The evidence is uncontradicted that until January 16, 1958, no deed to 571 Market Street was delivered to anyone, either by petitioners or by Cal Pac. Cal Pac could not and did not deliver petitioners' deed to the order of the Sharons until January 16, *after* Cal Pac had been authorized by the Sharons to execute and deliver a deed on behalf of the Sharons to Standard Oil or its order. A deed to 571 Market Street was thereafter delivered, in accordance with the escrow instructions of the Sharons and Standard Oil, to Standard Oil on January 31, 1958. (S.F. 16, 18, 22, 24, 26, 27).

Contrary to the Tax Court's sentiment that these were mere "formal matters," the law is clear that an escrow holder has no authority to deliver a deed in conflict with the parties' escrow instructions, and a deed delivered contrary to such instructions is void. 18 Cal. Jur. 2d, *Escrows*, sec. 37, at pp. 369-371 (1954); *Los Angeles High School Dist. v. Quinn*, 195 Cal. 377, 383, 234 Pac. 313 (1925). Petitioners gave Cal Pac no authority other than to deliver a deed "to the order of Hurford C. Sharon et al. . . ." (S.F. 16).

It is clear that both the facts and the law applicable thereto compel the conclusion that Standard Oil's contractual rights with respect to 571 Market Street did not prevent the consummation of an exchange with the Sharons, and consequently, that no sale between petitioners and Standard Oil ever occurred.

The case which controls the disposition of the instant matter is *Alderson v. Commissioner*, 317 F.2d 790 (9th Cir. 1963), reversing 38 T.C. 215. In *Alderson*, taxpayers originally entered into an agreement with Alloy for the purchase and sale of taxpayers' Buena Park property. Thereafter, taxpayers decided to effect an exchange of such property for Salinas property owned by a third party. Alloy agreed to taxpayers' plan whereby Alloy would acquire title to the Salinas property and immediately reconvey it to taxpayers in exchange for taxpayers' Buena Park property.

Thereafter, taxpayers entered into a contract with the owners of the Salinas property whereby taxpayers agreed to purchase such property for cash. Taxpayers' escrow instructions requested the escrow holder to take title to the Salinas property in its own name, to execute and record a deed to Alloy, and thereupon to immediately reconvey the property to taxpayers.

Thus, the *Alderson* case is factually the precise converse of the instant case.* In *Alderson*, Alloy agreed, in essence, to act as a conduit through which title to the Salinas property ultimately would pass to taxpayers from the Salinas owners. In the instant case, viewing the facts in the light least favorable to petitioners, the Sharons agreed to act as conduits through which title to 571 Market Street ultimately

*See the diagram comparing the *Alderson* case with the instant case, at Appendix B hereof.

would pass *from* taxpayers to Standard Oil.* Furthermore, in *Alderson* taxpayers had a contractual obligation to *purchase* the Salinas property from the owners thereof, while in the instant case, taxpayers had a contractual obligation to *sell* 571 Market Street to Standard Oil.

This Court held that since taxpayers intended to effect an exchange, and since the net effect of the transaction was an exchange, taxpayers' position should be sustained, despite the fact that Alloy never acquired any "real" ownership of the Salinas property before it was transferred to taxpayers, and despite the fact that taxpayers had entered into a contract for the purchase for cash of that property.

Thus, the *Alderson* case provides the conclusive answer to the Tax Court's holding in the instant case that petitioners never effected an exchange of their property with the Sharons for the reason that the Sharons never obtained any ownership of that property. In *Alderson*, Alloy likewise never obtained any "real" ownership in the Salinas property, since Alloy, prior to the vesting of record title in its name, had agreed to the immediate reconveyance of that property to taxpayers. Nevertheless, this Court held that Alloy's lack of a "real" interest in the property transferred to taxpayers did not disqualify the transaction as an exchange:

The title to the Lexington Street property was acquired by the Title Company for the purpose of the exchange, and it follows by analogy that *there was no need for Alloy to acquire a 'real' interest in the Salinas*

*Actually, petitioners' case is much stronger than taxpayers' position in *Alderson*, since petitioners executed the Agreement to Exchange and deposited deeds into escrow to the order of the Sharons before Standard Oil had exercised its option, precluding any finding that petitioners intended the Sharons would act as mere conduits through which 571 Market Street would pass.

property by assuming the benefits and burdens of ownership to make the exchange qualify under the statute although respondent asserts that failure of Alloy to hold a 'real' interest in the Salinas property precluded the transactions involved from being construed as constituting an exchange. (Emphasis added).

The Mercantile case appears to hold that one need not assume the benefits and burdens of ownership in property before exchanging it but may properly acquire title *solely for the purpose of exchange* and accept title and transfer it in exchange for other like property, all as a part of the same transaction with no resulting gain which is recognizable under Section 1002 of the Internal Revenue Code of 1954. (Emphasis added by court, 317 F.2d at p. 795).

There are, of course, two aspects to every exchange: The transfer of property *to* the taxpayer, and the transfer of property *from* him. Obviously, the courts must apply the same rules of law in determining the legal effect of both aspects of such transfers. *Alderson* holds that the party transferring property *to* the taxpayer need not have acquired any "real" interest in such property. It must follow, therefore, that the party receiving property *from* the taxpayer likewise need not acquire such an interest. Consequently, the fact that 571 Market Street passed simultaneously from the Sharons to Standard Oil did not disqualify the transaction as an exchange.

Furthermore, *Alderson* completely undermines the Tax Court's holding herein that Standard Oil's pre-existing contract to purchase petitioners' property for cash in some manner prevented petitioners from exchanging that property with the Sharons. In *Alderson*, taxpayers were likewise contractually obligated to purchase the Salinas property from its owner for cash. However, since the sole concern of the owner of that property was the receipt of

the purchase price in cash, and the form which the transaction took was of no consequence to him, this Court properly refused to hold that the existence of this contractual obligation of taxpayers was material in determining whether the substance of the transaction was an exchange. Similarly, since in the instant case Standard Oil's sole concern was to obtain a deed to 571 Market Street, and since it had no interest in or legal control over the form which this ultimate transfer took, the existence of this contractual obligation of petitioners likewise could not affect the substance of the transaction as an exchange.

The Tax Court attempted to distinguish the *Alderson* case, and other similar cases cited by petitioners, upon the purely factual ground that those cases involved the sufficiency of the transfer of property *to* the taxpayers, while the instant case involves the sufficiency of the transfer of property *from* the taxpayers. We have already pointed out that both aspects of an exchange must be governed by the same legal principles. The Tax Court utterly failed to apply the principles set forth in *Alderson* (and the other cases cited by petitioners) to the facts of the instant case, merely stating that "In each of those cases both the form and the substance of the transaction was an exchange." (C.T. 163). Petitioners submit that in the instant case, as we have shown, the transaction likewise took the form of an exchange, and that the substance of the transaction is identical to the *Alderson* case.

The principle announced in *Alderson* has been employed in numerous cases. See, *e.g.*, *Coastal Terminals, Inc. v. United States*, 320 F.2d 333 (4th Cir. 1963); *Mercantile Trust Co.*, 32 B.T.A. 82 (1935), *acq.*, XIV-1 Cum. Bull. 13; *Antone Borchard*, 24 T.C. Memo. 1643 (1965). The following language from the *Mercantile Trust* case is particularly pertinent:

In the cited case of *Gregory v. Helvering*, *supra* [293 U.S. 465], the Supreme Court determined the taxable status of the questioned transaction 'by what actually occurred'—the receipt of the taxed stock by the taxpayer. To sustain respondent upon the present record, we would be compelled to ignore the exchange that actually occurred, and tax, as received by the taxpayers, money never, in fact, received by or for them, in a sale that did not occur. We cannot here thus substitute fiction for fact. (32 B.T.A. at p. 87).

Similarly, in the instant case the Tax Court has ignored the exchange which actually occurred between petitioners and the Sharons, and has permitted a tax upon money never received by or for petitioners in a sale that never occurred. In *Mercantile Trust*, taxpayer had entered into alternative agreements with a title company, contemplating either the sale of their property or its exchange for like property in the event such property could be acquired. The court held that had taxpayers entered into separate agreements with the principals themselves, as did petitioners in the instant case:

Clearly it could not be said that an actual exchange of petitioners' investment property with . . . [the exchanging party] was an actual sale of it to . . . [the ultimate purchaser], merely because petitioners exchanged rather than sold the property for the purpose of postponing or avoiding income taxes. (32 B.T.A. at p. 87).

This is precisely what happened in the instant case. While petitioners herein could have simply sold their property to Standard Oil, or (like the taxpayers in *Alderson*, *Coastal Terminals* and *Mercantile Trust*) could have arranged for Standard Oil to acquire the Sharon Building for purposes of exchanging it with petitioners, there was absolutely

nothing in fact or in law which prevented them from consummating an exchange of that property with the Sharons. The Tax Court's holding to the contrary is unsupported by law or fact and must be reversed.

C. Section 1031(a) Applies to Simultaneous Sales and Purchases Where an Exchange Was Intended by the Parties, and Where the Transaction Had the Net Effect of an Exchange

Petitioners have no serious quarrel with the Tax Court's premise that section 1031(a) was intended to apply only to a direct exchange, rather than to a sale and subsequent purchase, since as we have previously shown, petitioners in fact consummated such a direct exchange. The evidence is clear that both petitioners and the Sharons expressly intended to effect a direct exchange, the transactions in escrow took the form of a direct exchange, and the net effect of these transactions was that petitioners had consummated a direct exchange.

However, even if it were assumed that the instant situation took the form of a simultaneous sale and purchase, petitioners submit that the same tax consequences should follow, and that the Tax Court's limitation of section 1031(a) to "direct exchanges" is unduly narrow, as many cases and authorities have pointed out.

Initially, the legislative history underlying section 1031(a) amply supports the view that the rationale of that section applies to certain "indirect exchanges" cast in the form of simultaneous sales and purchases. The court in *Jordan Marsh Company v. Commissioner*, 269 F.2d 453, 455 (2d Cir. 1959), quotes from the pertinent committee reports as follows:

'In other words, profit or loss is recognized in the case of exchanges of notes or securities, which are essentially like money; or in the case of stock in trade;

or in case the taxpayer exchanges the property comprising his original investment for a different kind of property; but if the taxpayer's money is still tied up in the same kind of property as that in which it was originally invested, he is not allowed to compute and deduct his theoretical loss on the exchange, nor is he charged with a tax upon his theoretical profit. The calculation of the profit or loss is deferred until it is realized in cash, marketable securities, or other property not of the same kind having a fair market value.' (Emphasis added).

Thus section 1031(a) was enacted to defer recognition of gain or loss in those situations where the taxpayer's money remains *tied up* in like property, preventing the use, control or enjoyment of the theoretical gain arising from the transaction. In the case of exchanges cast in the form of simultaneous sales and purchases in escrow, there is no use, control or enjoyment of the proceeds of the alleged sale, since the taxpayer has previously committed these proceeds for use in effecting the ultimate exchange.

The very cases upon which the Tax Court relied on this point support a broader interpretation of section 1031(a). Thus, in *Trenton Cotton Oil Co. v. Commissioner*, 147 F.2d 33, 36 (6th Cir. 1945), the court stated the underlying purpose of section 112(b) [now 1031(a)] to be as follows:

The purpose of Section 112(b) was to save the taxpayer from an immediate recognition of gain and the tax thereon and conversely to intermit the claim of a loss in exchange transactions where gain or loss may have occurred in a constitutional sense, but where in a popular and economic sense there had been a mere change in the form of ownership or in other words that substance and not form should control in determining whether gain or loss had been realized or sustained. *Portland Oil Company v. Com'r*, 1 Cir., 109 F.2d 479.

It is no wonder, then, that more recent cases have adopted an approach including within the ambit of section 1031(a) certain transactions cast in the form of simultaneous sales and purchases which have the intended and actual effect of an ultimate exchange, without gain or loss in a popular and economic sense, and which result in a mere change in the form of ownership.

The Internal Revenue Service itself recognizes this principle. Rev.Rul. 57-469 (1957-2 Cum. Bull. 521) provides in pertinent part as follows:

The courts have repeatedly held that where a sale is part of a transaction the purpose of which is to effectuate an exchange, and whereby an exchange has resulted, the transaction is an exchange for tax purposes and the sale is to be disregarded. [Citations] A fundamental principle of taxation is that substance and not form governs in tax matters. [Citations] In determining the substance of a transaction, the situation as it existed in the beginning and at the end of a series of steps and the object sought to be accomplished should be considered.

The most recent case adopting such an approach is *Coastal Terminals, Inc. v. United States*, 320 F.2d 333, 337 (4th Cir. 1963), also cited by the Tax Court as authority for restricting section 1031(a) to "direct exchanges." It is true that the court used these words in describing the type of transactions to which section 1031(a) applies. However, the court clearly indicated that transactions meeting the following tests would constitute "direct exchanges" qualifying under section 1031(a):

'Whether the transaction constituted a sale or an exchange for income tax purposes depends on the intent of the parties and this intent is to be ascertained from all relevant facts and circumstances, and of neces-

sity the case is largely dependent upon circumstantial evidence.' (Emphasis added).

Sarkes Tarzian, Inc. v. United States (7th Cir.), 240 F.2d 467, 470.

'* * * the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant.' (Emphasis added).

Commissioner of Internal Revenue v. Court Holding Co., 324 U.S. 331, 334, 65 S.Ct. 707, 708, 89 L.Ed. 981.

'The transaction here involved may not be separated into its component parts for tax purposes. *Tax consequences must depend on what actually was intended and accomplished rather than on the separate steps taken to reach the desired end.*' (Emphasis added).

Century Electric Co. v. Commissioner of Internal Revenue (8th Cir.), 192 F.2d 155, 159.

In accord are *Mercantile Trust Co. & Nelson v. Commissioner of Internal Revenue*, 32 B.T.A. 82; *W. D. Haden Co. v. Commissioner of Internal Revenue*, 165 F.2d (5th Cir.) 588, and *Alderson v. Commissioner of Internal Revenue* (9th Cir.), 317 F.2d 790.

Thus the test adopted by the court in *Coastal* and by the numerous cases cited therein, is simply this: Where the parties to a multi-step transaction *intended* to effect an exchange, and the *net effect* of such transaction was an exchange, the transaction will be treated as an exchange for tax purposes, regardless of the form of the separate steps taken to reach that end. Therefore, it is apparent that even if in form petitioners had "sold" their property to Standard Oil and, simultaneously, as part of the same multi-step transaction, "purchased" the Sharon property, the transaction would have met the tests of intent and net effect set forth above.

One is forced to the conclusion that in multi-party cases involving escrow transactions and common escrow agents,

the form or mechanics of the various transfers or the sequence of events in escrow are largely fortuitous, often subject to the arbitrary judgment of the common escrow holder and other factors over which the parties have little or no control, and as such should not override the intent of the parties and the net result obtained. *Given the decision to effect an exchange*, simultaneous transactions in escrow which have the net effect of an exchange should be so treated, regardless of the form which these transactions take.

For further cases and authorities recognizing these principles, see *J. H. Baird Publishing Co. v. C.I.R.*, 39 T.C. 608, 617-618 (1962), *acq.*, 1963-2 Cum. Bull. 4; *Allegheny County Auto Mart, Inc.*, 12 T.C. Memo. 427 (1953), *aff'd*, 208 F.2d 693 (3d Cir. 1954); *Century Electric Co. v. Commissioner*, 192 F.2d 155, 159-160 (8th Cir. 1951); *Louis W. Gunby, Inc. v. Helvering*, 122 F.2d 203, 205-206 (D.C. Cir. 1941); see also *Shoenberg v. Commissioner*, 77 F.2d 446, 449 (8th Cir. 1935), *cert. den.*, 296 U.S. 586 (1935); *Commissioner v. Dyer*, 74 F.2d 685 (2d Cir. 1935), *cert. den.*, 296 U.S. 586 (1935); *Frederick R. Horne*, 5 T.C. 250, 254-256 (1945); *Gregory v. Helvering*, 293 U.S. 465 (1935).

Each of these cases involved transactions which took the form of separate sales and purchases, but which were in substance and intent part of the same transaction, and therefore were treated as such for tax purposes. Therefore, while petitioners strongly contend that they effected a *direct* exchange with the Sharons, it is likewise clear from the foregoing authorities that even if the Tax Court were correct in holding that petitioners, prior to a sale of their property to Standard Oil, arranged for a simultaneous purchase of the Sharon Building with the intent to effect an ultimate exchange of like properties, the same tax consequences should follow.

CONCLUSION

The evidence in this case is uncontradicted that petitioners and the Sharons intended to effect and did effect a direct exchange of 571 Market Street for the Sharon Building. The transaction between petitioners and the Sharons had every indicia of such an exchange, and the net effect from petitioners' standpoint was that such an exchange had been consummated.

On the other hand, the Tax Court's determination that petitioners sold their property to Standard Oil is contrary to fact and law. The fact that petitioners previously had granted to Standard Oil an option to purchase which, upon the exercise thereof, ultimately ripened into a contract of purchase and sale, did not, as a matter of law, prevent petitioners from consummating the exchange with the Sharons, who took 571 Market Street subject to Standard Oil's rights under said contract, and who thereupon reconveyed such property to Standard Oil in recognition of those rights. Furthermore, the transactions in escrow had none of the indicia of a sale from petitioners to Standard Oil. Petitioners never owned, used or enjoyed the monies placed into escrow by Standard Oil (which were distributed to the Sharons in accordance with the Sharons' instructions), and never authorized the escrow holder to convey 571 Market Street to Standard Oil. Petitioners' escrow instructions expressly provided for the transfer of 571 Market Street *to the Sharons*, while the Sharons' escrow instructions provided for the subsequent transfer of such property to Standard Oil *from the Sharons*. It is clear, therefore, that petitioners never sold 571 Market Street to Standard Oil.

However, even if the Tax Court were correct in determining that petitioners sold 571 Market Street to Standard Oil and purchased the Sharon Building from the Sharons with the proceeds of that sale, still the transaction should be treated as an exchange under section 1031(a). If a sale to Standard Oil in fact occurred, it was contrary to the express intent of both petitioners and the Sharons, it was consummated simultaneously with the transfer of the Sharon Building through a common escrow holder, and the net effect of the transaction was that an exchange in substance occurred. Petitioners realized no gain from the transaction in a popular or economic sense, and their money remained tied up in like investment property, satisfying the underlying aims of section 1031(a).

Petitioners respectfully submit that the decision of the Tax Court was incorrect and should be reversed.

Dated: March 31, 1966.

EDWARD J. RUFF
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MICHAEL L. MELLOR

(Appendices Follow)

Appendix A

TABLE OF EXHIBITS

Exhibit No.	Description	Identified (references are to R.T. page nos.)	Received (references are to R.T. page nos.)	Printed (references are to C.T. page nos.)
1-A.....	Petitioners' 1958 tax return	7	62	28
2-B.....	Petitioners' 1959 tax return	7	62	49
3-C.....	Petitioners' 1960 tax return	7	62	62
4-D.....	Option agreement dated August 22, 1957	7	62	75
5-E.....	Letter dated August 29, 1957, from Buckbee Thorne to petitioners	7	62	77
6-F.....	Letter dated August 30, 1957 from Buckbee Thorne to Cal Pac	7	62	78
7-G.....	Letter dated November 25, 1957 from Cal Pac to Standard Oil	7	62	78
8-H.....	Written notice dated December 9, 1957 from petitioner John M. Rogers to Cal Pac	7	62	80
9-I.....	Cal Pac preliminary title report on the Sharon Building, dated December 9, 1957	7	62	82
10-J.....	Letter dated December 16, 1957 from Buckbee Thorne to Cal Pac.	7	62	84
11-K.....	Cal Pac receipt for check received from petitioner John M. Rogers, dated December 16, 1957	7	62	85
12-L.....	Deed to 571 Market Street dated December 17, 1957 delivered to Cal Pac by petitioners	7	62	86
13-M.....	Petitioners' escrow instructions to Cal Pac dated December 16, and 17, 1957	7	62	87
14-N.....	Standard Oil's escrow instructions to Cal Pac dated December 18, 1957	7	62	89
15-O.....	Letter dated December 19, 1957 from Cal Pac to Buckbee Thorne	7	62	97
16-P.....	Letter dated December 13, 1957 from Cal Pac to petitioners	7	62	98

Exhibit No.	Description	Identified (references are to R.T. page nos.)	Received (references are to R.T. page nos.)	Printed (references are to C.T. page nos.)
17-Q.....	Letter dated December 20, 1957 from Buckbee Thorne to petitioners	7	62	99
18-R.....	Letter dated December 23, 1957 from Buckbee Thorne to Cal Pac	7	62	100
19-S.....	Letter dated December 23, 1957 from Buckbee Thorne to petitioners	7	62	101
20-T.....	Deed to the Sharon Building dated December 19, 1957, executed by Hurford C. Sharon	7	62	102
21-U.....	The Sharons' escrow instructions to Cal Pac, dated January 16, 1958	7	62	104
22-V.....	Letter dated January 16, 1958 from Hurford C. Sharon to Cal Pac	7	62	109
23-W.....	The Sharons' supplemental instructions to Cal Pac, received by Cal Pac on January 16, 1958	7	62	111
24-X.....	Deed of Trust and Assignment of Rents delivered to Cal Pac by petitioners, dated January 15, 1958	7	62	112
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26-Z.....	Pro-ration statement prepared by Buckbee Thorne and addressed to petitioners, dated January 16, 1958	7	62	119
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30-DD.....	Pro-ration statement dated January 17, 1958 prepared by Cal Pac	7	62	132
31-EE.....	Pro-ration statement dated January 17, 1958 prepared by Cal Pac	7	62	132-A

Appendix

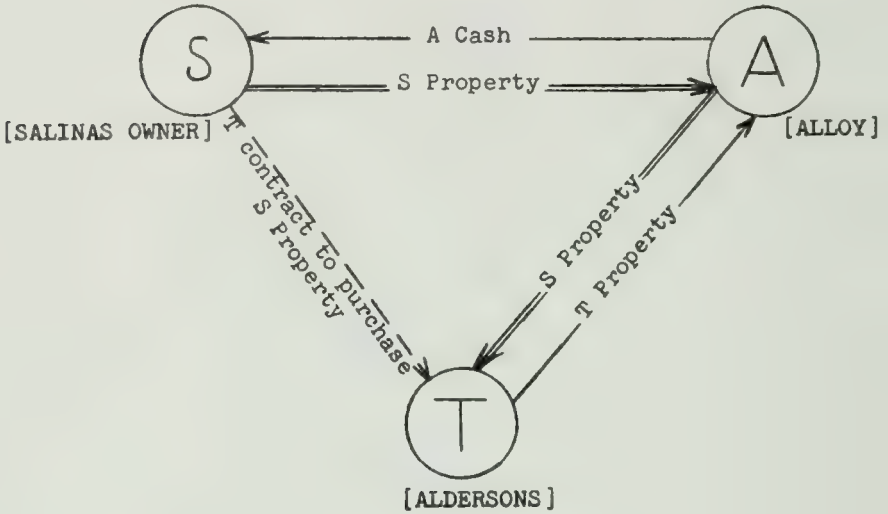
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Exhibit No.	Description	Identified (references are to R.T. page nos.)	Received (references are to R.T. page nos.)	Printed (references are to C.T. page nos.)
32-FF.....	Letter dated January 14, 1958 from Buckbee Thorne to Coldwell Banker & Co.	7	62	133
33-GG.....	Letter dated January 16, 1958 from petitioners to American Trust Company	7	62	134
34-HH.....	Letter dated January 20, 1958 from Cal Pac to Standard Oil	7	62	135
35-II.....	Letter dated January 29, 1958 from Cal Pac to Coldwell Banker & Co.	7	62	138
36-JJ.....	Grant Deed to 571 Market Street from Cal Pac to Standard Oil, dated January 31, 1958	7	62	139
37-KK.....	Letter dated January 31, 1958 from Cal Pac to American Trust Company	7	62	140
38-LL.....	Cash flow schedule	7	62	141
39.....	Agreement to Exchange dated December 2, 1957	29	31	142

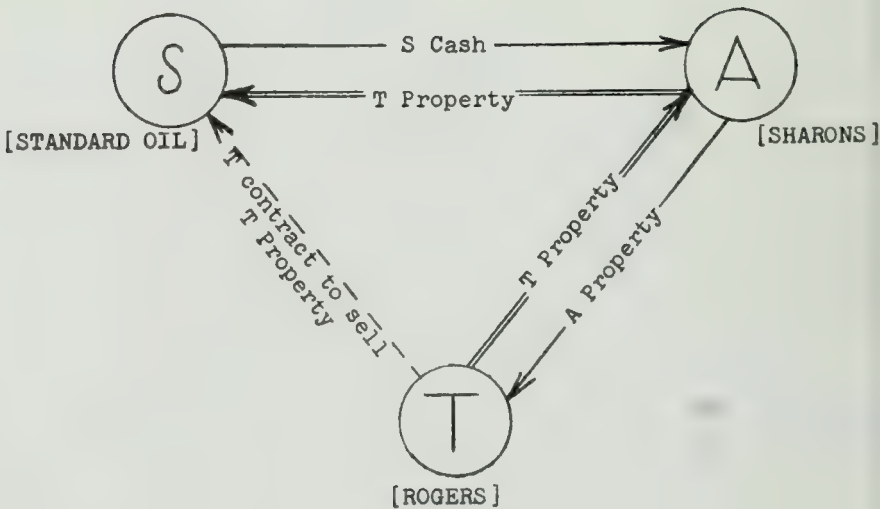
Appendix B

DIAGRAM OF THE ALDERSON AND ROGERS CASES

I ALDERSON CASE (Alderson v. Commissioner, 317 F.2d 790
[9th Cir. 1963]):



II ROGERS CASE:



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN M. ROGERS and JOHN M. ROGERS, Executor of the
Estate of GLADYS B. ROGERS, deceased,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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FILED

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WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 20,621

JOHN M. ROGERS and JOHN M. ROGERS, Executor of the
Estate of GLADYS B. ROGERS, deceased,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (IB-R.
144-164)^{1/} are reported at 44 T.C. 126.

JURISDICTION

The petition for review (IB-R. 169-173) involves individual income taxes for the year 1958. On June 28, 1963, the Commissioner of Internal Revenue mailed to the taxpayers a notice of a deficiency in income taxes for the year 1958 in the total amount of \$111,707.80.

^{1/} "IA-R." and "IB-R." references are to Volumes A and B of the record on appeal. "II-R." references are to Volume II of the record on appeal.

(IA-R. 7-14.) Within 90 days thereafter, on August 19, 1963, the taxpayers filed a petition with the Tax Court for a redetermination of the deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954. (IA-R. 1-5.) The decision of the Tax Court was entered July 26, 1965. (IB-R. 164a-164b.) The case is brought to this Court by a petition for review filed October 18, 1965 (IB-R. 169-173), within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTION PRESENTED

Whether the Tax Court correctly held that, where the taxpayers granted an option to purchase their property to Standard Oil of California and the option was exercised, the taxpayers sold their property to Standard Oil pursuant to the option and used the proceeds therefrom to purchase similar property from a third party and therefore--contrary to the taxpayers' position--did not effect an exchange of property upon which gain or loss would not be recognized pursuant to Section 1031 of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 1001. DETERMINATION OF AMOUNT OF AND RECOGNITION OF GAIN OR LOSS.

(a) Computation of Gain or Loss.--The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in

section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) Amount Realized.--The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

* * * *

(26 U.S.C. 1958 ed., Sec. 1001.)

SEC. 1002. RECOGNITION OF GAIN OR LOSS.

Except as otherwise provided in this subtitle, on the sale or exchange of property the entire amount of the gain or loss, determined under section 1001, shall be recognized.

(26 U.S.C. 1958 ed., Sec. 1002.)

SEC. 1031. EXCHANGE OF PROPERTY HELD FOR PRODUCTIVE USE OR INVESTMENT.

(a) Nonrecognition of Gain or Loss From Exchanges Solely in Kind.--No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment.

(b) Gain From Exchanges Not Solely in Kind.--If an exchange would be within the provisions of subsection (a), of section 1035 (a), or of section 1036 (a), if it were not for the fact that the property received in exchange consists not only of property permitted by such provisions to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(c) Loss From Exchanges Not Solely in Kind.--If an exchange would be within the provisions of subsection (a), of section 1035 (a), or of section 1036 (a), if it were not for the fact that the property received in exchange consists not only of property permitted by such provisions to be received without the recognition of gain or loss, but also of other

property or money, then no loss from the exchange shall be recognized.

(d) [As amended by Sec. 44(a) and (b), Technical Amendments Act of 1958, P. L. 85-866, 72 Stat. 1606] Basis.--If property was acquired on an exchange described in this section, section 1035(a), or section 1036(a), then the basis shall be the same as that of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized on such exchange. If the property so acquired consisted in part of the type of property permitted by this section, section 1035 (a), or section 1036(a), to be received without the recognition of gain or loss, and in part of other property, the basis provided in this subsection shall be allocated between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount equivalent to its fair market value at the date of the exchange. For purposes of this section, section 1035 (a), and section 1036 (a), where as part of the consideration to the taxpayer another party to the exchange assumed a liability of the taxpayer or acquired from the taxpayer property subject to a liability, such assumption or acquisition (in the amount of the liability) shall be considered as money received by the taxpayer on the exchange.

(26 U.S.C. 1958 ed., Sec. 1031.)

STATEMENT

During the year 1958, the taxpayers, John M. Rogers and Gladys B. Rogers, now deceased,^{2/} resided at Walnut Creek, California. They filed a joint federal income tax return on the cash method for that year. (IB-R. 145; see Ex. 1-A, IA-R. 28-46.)

^{2/} For convenience, the term "taxpayers" herein refers to John M. Rogers and Gladys B. Rogers, although upon her death her estate was substituted as a party to this case.

Late in 1955 the taxpayer John M. Rogers retired from his position as an executive of a large international engineering construction organization and thereafter was concerned with securing investment income. In April, 1956, the taxpayers acquired for investment an office building situated at 571 Market Street, San Francisco, California (hereinafter referred to as 571 Market Street), and thereafter held such property for the income derived from rents and profits. Coldwell, Banker & Company, a San Francisco real estate firm which had been instrumental in the sale of the property to taxpayers, performed for a fee the various duties associated with the management of the building. (IB-R. 145-146.)

The Standard Oil Company of California (hereinafter referred to as Standard Oil) desired to acquire five adjoining properties, including 571 Market Street, as the site for a proposed new office building, and prior to August 22, 1957, commissioned Buckbee Thorne & Company, a San Francisco real estate firm (hereinafter referred to as Buckbee Thorne) to negotiate for the purchase of such five properties on behalf of Standard Oil as undisclosed principal. Since Standard Oil wished to remain an undisclosed principal until all five properties had been assembled, Buckbee Thorne, with the authorization of Standard Oil, named California Pacific Title Insurance Company (hereinafter referred to as the title company) to acquire title for its principal. (IB-R. 146.)

During August, 1957, the taxpayers were approached by a representative of Buckbee Thorne who desired to obtain an option to purchase 571 Market Street. They advised such representative that they would sell for a price of \$750,000 plus the real estate commission, and on August 13, 1957, an escrow account (numbered 462011) was opened at the title company under the name "Buckbee Thorne-Rogers." (IB-R. 146.)

On August 22, 1957, the taxpayers granted to the title company an option to purchase 571 Market Street. (IB-R. 146; see Exs. 4-D, 5-E, IB-R. 75-76, 77.)^{3/} The option agreement provides in pertinent part as follows (IB-R. 147; Ex. 4-D, IB-R. 75-76):

For and in consideration of the sum of SEVEN THOUSAND SEVEN HUNDRED AND TWELVE AND 50/100 (\$7,712.50) Dollars to seller in hand paid, the receipt of which is hereby acknowledged by said seller, to apply on the purchase price, the undersigned JOHN M. ROGERS and GLADYS B. ROGERS herein designated as the seller, hereby grants the right and option to purchase and agrees to sell to CALIFORNIA PACIFIC TITLE INSURANCE COMPANY herein designated as the purchaser, or its assigns, at any time within 120 days from the date hereof, the following described property in the City and County of San Francisco, State of California, to wit: * * *

[here follows description of 571 Market Street]

For the purchase price of SEVEN HUNDRED SEVENTY ONE THOUSAND TWO HUNDRED FIFTY AND 00/100 (\$771,250.00) Dollars lawful money of the United States of America, payable as follows: CASH

* * * *

^{3/} The option agreement was recorded on December 18, 1957. (IA-R. 20.)

If said purchaser elects to purchase said property at the price and on the terms herein set forth, and within the time specified, the said purchaser shall give said seller due notice in writing and shall pay an additional sum of \$69,412.50 for account of said seller to Buckbee Thorne & Co. * * * said sum to apply on the purchase price * * *.

By letter dated August 30, 1957, Buckbee Thorne transmitted to the title company the option granted by the taxpayers to the title company as well as options for the other properties Standard Oil was seeking to acquire. (IB-R. 147; Ex. 6-F, IB-R. 78.)

The taxpayers then advised Coldwell, Banker & Company, as managers of their property, that they had entered into the option for the sale of 571 Market Street. (IB-R. 147.)

In mid-September, 1957, the taxpayers were approached by Coldwell, Banker & Company, acting as agents for the owners of an office building known as the Sharon Building, with the suggestion that the Sharon Building might be purchased for \$1,200,000, and that the proceeds from the sale of 571 Market Street might be used for such purpose. Prior to that time, the taxpayers were not aware that the Sharon Building was for sale. They advised Coldwell, Banker & Company at that time that they were not interested in buying another piece of property, but rather that they intended to invest the proceeds from the sale of 571 Market Street in high grade stock. Coldwell, Banker & Company then suggested that if they did not wish to purchase the Sharon Building it was possible that an advantageous exchange of 571 Market Street for the Sharon Building could be made and that the taxpayers would receive a return on their investment which would be substantial and comparable to that which they were then receiving. The

taxpayers proposed an exchange in which the Sharon Building would be valued at \$1,050,000 and 571 Market Street would be valued at its then option price of \$771,250. This proposal was rejected, but the owners of the Sharon Building countered with an offer to value the Sharon Building at \$1,150,000. (IB-R. 147-148.)

On November 25, 1957, the title company addressed a letter to Standard Oil requesting that the latter assume the obligation of holding the title company harmless on account of any loss it might sustain in making payments to tenants of properties to be acquired in order to secure early terminations of such leases. Standard Oil so agreed. (IB-R. 148; Ex. 7-G, IB-R. 79.)

The taxpayers executed a document entitled "Agreement to Exchange" dated December 2, 1957. That document does not bear any other signatures. It recites that the taxpayers agreed to exchange 571 Market Street for the Sharon Building. It further provided that 571 Market Street should be transferred subject to existing leases and "subject to existing option to sell, which obligation is to be assumed by the owners" of the Sharon Building. It further provided that coincident with the exchange of deeds to the two properties the taxpayers agreed to pay the owners of the Sharon Building \$400,000 in cash, and that "This offer is made subject to Coldwell, Banker & Company securing a loan on the Sharon Building in the sum of at least \$600,000", with interest, installment payments, and other terms satisfactory to the taxpayers. (IB-R. 148-149; Ex. 39, IB-R. 142-143; see also II-R. 29-31.)

On December 6, 1957, the taxpayers left the above document with Coldwell, Banker & Company. On the same date an escrow account (numbered 463529) was opened at the title company under the name "Sharon--Coldwell Banker & Co." (IB-R. 149.)

On December 9, 1957, the taxpayer John M. Rogers addressed a letter to the title company advising that he had entered into an agreement with the twelve owners of the Sharon Building to exchange 571 Market Street, subject to the outstanding option, for the Sharon Building. (IB-R. 149; Ex. 8-H, IB-R. 80-81.)

On December 9, 1957, the title company issued a preliminary title report concerning the Sharon Building and delivered it to the taxpayers. (IB-R. 149; Ex. 9-I, IB-R. 82-83.)

On December 16, 1957, Buckbee Thorne notified the title company that thereafter Standard Oil would issue instructions to the title company regarding the options. (IB-R. 149; Ex. 10-J, IB-R. 84.)

On December 16, 1957, the taxpayer John M. Rogers delivered to the title company his check for \$7,712.50, which amount equalled the consideration previously paid to him and his wife for the option granted by them on August 22, 1957. The receipt given by the title company for such amount stated that such sum was to be applied on an exchange proration statement to be supplied by Coldwell, Banker & Company. (IB-R. 150; Ex. 11-K, IB-R. 85.)

On December 17, 1957, the taxpayers delivered to the title company a deed conveying 571 Market Street to the title company. At the same time the taxpayers gave written escrow instructions to the title company

"to deliver said deed to the order of Hurford C. Sharon, et al.," at such time as the title company had vested title to the Sharon Building in the taxpayers, the taxpayers have given the title company their promissory note in the amount of \$550,000 payable to Aetna Life Insurance Company secured by a deed of trust on the Sharon property and the title company had in its possession the proceeds of a loan of \$550,000 from such life insurance company. The title company was further instructed by the taxpayers to use the loan of \$550,000 to pay off an existing mortgage on 571 Market Street held by Equitable Life Assurance Society, pay Hurford C. Sharon et al., the sum of \$368,750, and to make other specified disbursements. (IB-R. 150; Exs. 12-L, 13-M, IB-R. 86-88.)

On December 18, 1957, Standard Oil delivered a letter of escrow instructions authorizing and directing the title company to record on December 18, 1957, the five options (including the option on 571 Market Street), to exercise such options on December 19, 1957, by sending notices to the respective property owners in care of Buckbee Thorne, to take title to the properties in its (the title company's) name, and then convey the five parcels of property to Standard Oil in one grant deed. In that letter, Standard Oil stated that it would at the same time deliver to Buckbee Thorne for the account of the respective owners the amounts which it had been agreed would be paid upon the exercise of the options (including \$69,412.50 for the account of the taxpayers) and that it would issue to the title company a check for \$2,344,537.50 to cover the remaining purchase price of all the five properties. (IB-R. 150-151; Ex. 14-N, IB-R. 89-96.)

On December 19, 1957, the title company addressed a letter, dated December 13, 1957, to the taxpayers in care of Buckbee Thorne, giving notice of the exercise of the option on 571 Market Street. At the same time the title company gave its check in the amount of \$69,412.50 to Buckbee Thorne for the account of the taxpayers and furnished Buckbee Thorne a copy of the previously mentioned letter of December 9, 1957 (Ex. 8-H, IB-R. 80-81), addressed by the taxpayer John M. Rogers to the title company. On the same date, Standard Oil delivered to the title company its check for \$2,344,537.50. (IB-R. 151; Exs. 15-O, 16-P, IB-R. 97-98.)

On December 20, 1957, Buckbee Thorne notified the taxpayers by telephone that the option had been exercised and that it had received from the title company its check for \$69,412.50. On the same date, Buckbee Thorne addressed a letter to the taxpayers containing the same information and stating that the title company had requested that the check be returned to it to be held by it in connection with an exchange of 571 Market Street for the Sharon Building. In that letter Buckbee Thorne requested the taxpayers' approval to pay over the \$69,412.50 to the title company for such purpose. On December 23, 1957, on a copy of such letter, the taxpayers acknowledged receipt of notice of the exercise of the option and approved the payment of the \$69,412.50 to the title company. Accordingly, on the same day Buckbee Thorne endorsed the check and returned it to the title company. (IB-R. 151-152; Ex. 17-Q, IB-R. 99; see also Exs. 18-R, 19-S, IB-R. 100-101.)

Between December 19, 1957 and January 8, 1958, each of the twelve owners of the Sharon Building executed a grant deed conveying his interest in the Sharon Building to the taxpayers. These deeds were delivered to the title company on January 16, 1958, and were enclosed in a letter of escrow instructions by Hurford C. Sharon, acting as agent for the various owners of the Sharon Building, wherein the title company was authorized to deliver the deeds to the taxpayers when the title company received \$1,150,000 for the account of the Sharons. Such letter also contained the following (IB-R. 152; Ex. 21-U, IB-R. 104-108):

It is understood that \$400,000.00 of such sum is to be received by you from the Rogers and \$750,000.00 is to be received by you from a purchaser of * * * [description of 571 Market Street], which property is hereinafter referred to as the "Exchange Property". It is understood that Rogers will convey to you on behalf of the Owners [Sharon interests], the Exchange Property, in addition to the payment of said sum of \$400,000.00. You are hereby authorized to execute a deed of the Exchange Property on behalf of the Owners [Sharons] conveying said property to Standard Oil Company of California the present holder of an option to purchase the Exchange Property, or its order, and you are further authorized to deliver said deed to said grantee when you hold said sum of \$750,000.00 heretofore mentioned for the account of the Owners [Sharons].

On the same date the above instructions were amended to authorize the delivery of the deeds to the taxpayers upon the receipt by the title company for the account of the Sharons of \$1,118,750 (\$368,750 from the taxpayers and \$750,000 from Standard Oil), instead of \$1,150,000 the difference of \$31,250 representing commission of Coldwell, Banker & Company for arranging the transaction. On the same date Hurford C. Sharon issued supplemental instructions to the title company to release

the sum of \$21,250 out of funds deposited by Standard Oil^{4/} to satisfy the demand of Buckbee Thorne, and also to prorate rent and insurance credited on the Market Street property and pay it to the ultimate purchaser, Standard Oil. (IB-R. 153; Exs. 22-V, 23-W, IB-R. 109-111.)

On January 16, 1958, the taxpayers deposited with the title company a deed of trust in the amount of \$550,000 covering the Sharon Building, as security for the Aetna Life Insurance Company loan of \$550,000 to the taxpayers. (IB-R. 153; Exs. 24-X, 25-Y, IB-R. 112-118.)

On January 16, 1958, the title company recorded the deeds transferring the Sharon Building to the taxpayers, and the taxpayers' deed conveying 571 Market Street to the title company. On the same date, the taxpayers notified the tenant of 571 Market Street to pay all future rentals to the title company. (IB-R. 153; Ex. 33-GG, IB-R. 134.)

On January 20, 1958, the title company sent to the manager of the office buildings department of Standard Oil a letter in which it was stated that on January 16, 1958, it had recorded, for the account of Standard Oil, the deed from the taxpayers to it covering 571 Market Street. (IB-R. 153-154; Ex. 34-HH, IB-R. 135-137.)

On January 29, 1958, the title company sent a letter to Coldwell, Banker & Company stating that the Sharon Building was acquired by the taxpayers "in consideration of the sum of \$400,000.00 and the exchange of Market Street property, which was sold in the same transaction, for a consideration of \$750,000.00." (IB-R. 154; Ex. 35-II, IB-R. 138.)

^{4/} The amount deposited with the title company in escrow was actually \$771,250, instead of \$750,000. (IB-R. 153.)

On January 31, 1958, the title company executed one grant deed conveying to Standard Oil the five parcels of property, including 571 Market Street, and such deed was recorded on that date. On the same date the title company assigned the lease of 571 Market Street to Standard Oil and notified the tenant to pay all future rentals to Standard Oil. The delay in transferring the properties to Standard Oil was due to difficulty encountered by the title company in clearing title to some of the property which was to be included, along with 571 Market Street, in a single deed to Standard Oil. (IB-R. 154; Exs. 36-JJ, 37-KK, IB-R. 139-140.)

The taxpayers had collected the rental on 571 Market Street for the full month of January, 1958 in the amount of \$4,583.33. Of this amount they retained \$2,291.67, representing the amount allocable to the period from January 1 to January 16. The remainder was not received by the Sharon interests but was paid to Standard Oil. (IB-R. 154.)

After the taxpayers acquired the Sharon Building they held it for the income derived from rents and profits. (IB-R. 154.)

On their federal income tax return for the taxable year 1958 the taxpayers reported the above transaction as follows (IB-R. 155; Ex. 1-A, IA-R. 33):

On January 16, 1958, the taxpayers exchanged a building at 571 Market Street, San Francisco, for the Sharon Building, located at 39-61 New Montgomery Street, San Francisco. The exchange was as follows:

Value of property acquired:

Land (4/15 per appraisal)	\$306,666.67	
Building (11/15 per appraisal)	<u>843,333.33</u>	\$1,150,000.00
Less liabilities assumed		<u>550,000.00</u>
		\$ 600,000.00

Cost of property given up:

Building	\$194,000.00	
Less depreciation	<u>13,580.00</u>	
	\$180,420.00	
Land	<u>129,463.50</u>	\$309,883.50
Less liabilities transferred	<u>148,500.00</u>	161,383.50
		\$ 438,616.50
Expenses of exchange - net		<u>20,011.43</u>
		\$ 418,605.07

UNRECOGNIZED GAIN

In accordance with Section 1031 of the Internal Revenue Code, the gain is not recognized.

In the notice of deficiency the Commissioner determined that the gain realized should be recognized, stating (IB-R. 155-156; IA-R. 9):

It is determined that you realized a long-term capital gain in the amount of \$439,265.85 resulting from the sale of the real estate known as 571 Market Street, San Francisco, California. Such gain is taken into account to the extent of 50%, or \$219,632.92, in computing taxable income. The gain is computed as follows:

Sales price	\$771,250.00
Expense of sale	<u>22,100.65</u>
Net	\$749,149.35
Basis per return	<u>309,883.50</u>
Gain on sale	\$439,265.85

The Tax Court, noting that the escrow instructions of the Sharon interests to the title company provided that the deeds for the Sharon building were to be delivered to the taxpayers only when the title company

had received for the Sharons the proceeds from the taxpayer and Standard Oil for the Sharon Building (IB-R. 160) and that by the time that the Sharon interests delivered deeds to the Sharon Building to the title company on January 16, 1957, it was "impossible for the Sharons to obtain any ownership of 571 Market Street since the * * * [taxpayers] had already effectively disposed of that property to Standard Oil" (IB-R. 162) pursuant to the option exercised by Standard Oil on December 19, 1957 (IB-R. 160), found and held that the taxpayers (IB-R. 163)--

sold 571 Market Street to Standard Oil pursuant to the option, that the proceeds therefrom were used by them to purchase the Sharon Building, and that there was not an exchange by the * * * [taxpayers] of 571 Market Street for the Sharon Building.

Accordingly, it sustained the Commissioner's determination "that the transactions by which the * * * [taxpayers] disposed of 571 Market Street and acquired the Sharon Building do not qualify as an exchange under the nonrecognition provisions of section 1031 of the Internal Revenue Code of 1954" (IB-R. 157) and, therefore, the gain realized by the taxpayers "upon the disposition * * * of 571 Market Street is to be recognized" (IB-R. 164) under Section 1002 of the 1954 Code.

SUMMARY OF ARGUMENT

Section 1031(a) of the Internal Revenue of 1954 provides that no gain or loss shall be recognized upon an exchange of like kind properties. That provision, as its terms and its legislative history make clear, does not apply where a taxpayer sells property and thus realizes cash gains (or losses), whether or not he reinvests the proceeds in other property. Congress has deliberately and wisely limited Section 1031 to exchanges, and effect must be given to that limitation.

In the instant case, the taxpayers sold 571 Market Street to Standard Oil and thus realized cash proceeds which they used to purchase the Sharon Building. Accordingly, there was no exchange of like kind properties but, instead, a sale and a reinvestment.

Further, arguendo, any exchange which occurred was not one of "like kind" properties within the meaning of Section 1031(a). Here, after the purchase option was exercised in December, 1957, the taxpayers held only a vendor's bare legal title to 571 Market Street plus their contractual rights to the sales proceeds. It follows that, even if, arguendo, they still held that vendor's title on January 16, 1958, when the alleged exchange took place, they could not then have possibly conveyed 571 Market Street--as like kind investment property--to the Sharons. Indeed, in Commissioner v. P. G. Lake, Inc., 356 U. S. 260 (1958), rehearing denied, 356 U. S. 964, the Supreme Court held that a contractual right to receive cash cannot be like kind property within the meaning of Section 1031(a).

Moreover, the facts show that the Sharons were unwilling to acquire 571 Market Street, subject to the unexercised option and, therefore, committed themselves to convey the Sharon Building to the taxpayers only upon receipt of the sales proceeds therefor. In other words, they sold their building to the taxpayers for cash and never acquired the taxpayers' property in exchange.

In the light of the foregoing, the Tax Court was correct in holding that the references in the escrow instructions to a deed to 571 Market Street being conveyed on behalf of and to the order of the

Sharons were mere formalities which did not reflect the substance of the transaction. But, even if, arguendo, those references were given effect, no transfer of a vendor's bare legal title (which, for reasons already stated, does not qualify as like kind property) could have taken place because the conditions of the sales contract between Standard Oil and the taxpayers had been satisfied and thus legal title had vested in Standard Oil prior to January 16, 1958, when the alleged exchange took place.

ARGUMENT

SINCE THE TAXPAYERS DID NOT EXCHANGE THEIR
PROPERTY FOR LIKE PROPERTY, SECTION
1031 OF THE INTERNAL REVENUE CODE OF
1954 IS INAPPLICABLE, AND THE GAIN
REALIZED BY THEM ON THE DISPOSITION
OF THEIR PROPERTY MUST BE RECOGNIZED

A. Introduction

Standard Oil, an undisclosed principal acting through Buckbee Thorne as its agent, and using the services of the title company, as escrow holder, sought a site for an office building, including 571 Market Street owned by the taxpayers. (IB-R. 146; IA-R. 19.) On August 22, 1957, the taxpayers granted Standard Oil (still undisclosed) an option to purchase 571 Market Street for a net price of \$750,000. (IB-R. 146-147; II-R. 19-22; Exs. 4-D - 6-F, IB-R. 75-78.) On December 19, 1957, two days after the taxpayers transferred a deed to their property to the escrow holder, the option was exercised, the requisite down payment was made and the balance of the purchase price was paid to the escrow holder. On the next day, the taxpayers were so advised and on

December 23, 1957, they acknowledged receipt of the down payment. (IB-R. 150-152; II-R. 39-41, 53-56, 58-59, 61-67; Exs. 12-L, 14-N, 16-P, 17-Q, 34-HH, IB-R. 86, 89-96, 98-99, 135-137; see also Exs. 26-Z - 28-BB, IB-R. 119-122.) On January 31, 1958, after a delay caused by certain apparently technical difficulties involved in obtaining clear title to some of the parcels included in the site, a single deed for the entire site (as Standard Oil had requested), including 571 Market Street, was transferred directly from the title company to Standard Oil. (IB-R. 154; II-R. 61-67, 73, 85; Exs. 36-JJ, 37-KK, IB-R. 139-140.)

In the meantime, in mid-September, 1957, the taxpayers' property manager, Coldwell, Banker & Company, acting on behalf of the Sharon interests, had approached the taxpayers with the suggestion that they acquire the Sharon Building with the proceeds from the then-pending sale of 571 Market Street. The taxpayers indicated that they would be interested in exchanging their property, subject to the purchase option, for the Sharon Building, and a valuation of that building was made for that purpose. (IB-R. 147-148; II-R. 22-27.) In early December, the taxpayers--but no other party--executed a so-called exchange agreement which recited, inter alia, that the Sharons would receive 571 Market Street subject to the option; a second escrow was then opened with the title company and the taxpayers notified the title company that they had agreed to an exchange. (IB-R. 148-149; II-R. 27-34, 50-51; Ex. 8-H, IB-R. 80-81; Ex. 39, IB-R. 142-143.) On December 17, 1957, when the taxpayers delivered their deed to the title

company, they instructed it, as escrow holder, to deliver that deed "to the order of Hurford C. Sharon, et al" at such time as title to the Sharon Building vested in the taxpayers and the taxpayers' \$550,000 note and loan proceeds were in the possession of the title company. The title company was further instructed to use the loan proceeds to pay off a mortgage indebtedness on 571 Market Street, and to pay Hurford C. Sharon, et al., \$368,750. (IB-R. 150; II-R. 35-38, 40, 42-46, 58-59; Ex. 13-M, IB-R. 87-88.) On January 16, 1958, the Sharons delivered deeds to the Sharon Building to the title company with their instructions to it, as escrow holder, that, inter alia, the deeds should be delivered to the taxpayers only when the title company was in receipt of the proceeds owed to the Sharons for the Sharon Building, which would be paid by the taxpayers and by Standard Oil (for 571 Market Street). Those instructions further authorized the title company to transfer a deed to 571 Market Street to Standard Oil on behalf of the Sharon interests when the title company held the proceeds for that property on behalf of the Sharon interests. (IB-R. 152-153; Exs. 21-U, 22-V, IB-R. 104-110.)

The taxpayers realized a gain of over \$400,000 upon the disposition of 571 Market Street. (IB-R. 155-156.) The question before this Court is whether that gain is to be recognized and thus taxed in the year 1958 as long term capital gain or, instead, is to be recognized only when (and if) the taxpayers dispose of the Sharon Building in a taxable transaction.

Under Sections 1001 and 1002 of the Internal Revenue Code of 1954, ^{5/} supra, gain or loss realized upon the disposition of property--whether a sale or an exchange--is usually recognized. An exception to that general rule is provided by Section 1031(a), supra, as follows:

(a) * * * No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including * * * choses in action, * * * or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment. 6/

The taxpayers contend that either: (1) they exchanged their property for the Sharon Building or (2), there was a simultaneous sale of their property and a purchase of the Sharon Building which had the net effect of an exchange, and that--in either event--the transaction is encompassed by Section 1031(a). We contend that there was not an exchange but, instead, a contemporaneous sale and purchase of the two properties and that Section 1031, supra, does not apply to such transactions. We further contend that, in any event, because of the purchase option which had been previously exercised by Standard Oil, the taxpayer did not have "like" kind property within the meaning of Section 1031(a) to exchange for the Sharon Building (or to sell) but, instead, had only a chose in action--whether or not coupled with legal

5/ Hereafter, except as otherwise indicated all references to sections are to the Internal Revenue Code of 1954.

6/ Under Section 1031(d), supra, where Section 1031(a) applies, a taxpayer's basis for the property he has exchanged is carried over to his newly acquired property. It is thus possible for the non-recognized gain to be taxed in the future if and when the newly acquired property is disposed of in a taxable transaction.

title to the property--to transfer to the Sharons and that Section 1031(a) does not apply to such property.

- B. Since Congress has deliberately limited the application of Section 1031 to exchanges of like kind property, that provision does not apply where a taxpayer sells property and immediately reinvests in similar property

Fundamental to our contentions, outlined above, is our position that there is no "exchange" within the meaning of Section 1031 where a taxpayer sells property--thus significantly realizing gains in the sense of converting his investment or business property into the right to receive cash proceeds therefor--and immediately reinvests those proceeds (or the right thereto) into other similar property. In enacting Section 1031, Congress carefully distinguished between gains or losses realized upon a sale--regardless of any contemporaneous reinvestment--and the theoretical gains or losses realized upon direct exchanges, by deliberately restricting the non-recognition rule of Section 1031 to exchanges. "'Exchange' is a word of precise import, meaning the giving of one thing for another * * * and excluding transactions into which money enters * * * as the consideration * * *." Trenton Cotton Oil Co. v. Commissioner, 147 F. 2d 33, 36 (C. A. 6th, 1945); see also Jordan Marsh Co. v. Commissioner, 269 F. 2d 453, 457 (C. A. 2d, 1959).

In harmony with this concept of taxing realized cash-like gains, under the initial nontaxable exchange provision, Section 202(c) of the Revenue Act of 1921, c. 136, 42 Stat. 227, gain was recognized upon an exchange of property if the property received had a "readily realizable

fair market value". Because that terminology, however, proved to be too vague and indefinite to be workable, the "like kind" test was adopted as a refinement in Section 203(b)(1) of the Revenue Act of 1924, c. 234, 43 Stat. 253, and has been subsequently retained in the statute by re-enactment in successive Revenue Acts.^{7/} See Jordan Marsh Co. v. Commissioner, supra, pp. 455-456. In 1924, when Section 203(b)(1) of the 1924 Act was presented to Congress, the question whether a sale and a contemporaneous reinvestment in like kind property would qualify as a nontaxable exchange was answered in the following colloquy in the House between one of the sponsors of the bill and another Representative (65 Cong. Record, Part 3, p. 2799):

Mr. LaGuardia. Under this paragraph is it necessary to exchange the property? Suppose the property is sold and other property immediately acquired for the same business. Would that be a gain or loss, assuming there is greater value in the property acquired?

* * * *

Mr. Green of Iowa. If the property is reduced to cash and there is a gain, of course it will be taxed.

Mr. LaGuardia. Suppose that cash is immediately put back into the property, into the business?

Mr. Green of Iowa. That would not make any difference.

^{7/} See Section 203(b)(1), Revenue Act of 1926, c. 27, 44 Stat. 9; Section 112(b)(1), Revenue Act of 1928, c. 852, 45 Stat. 791; Section 112(b)(1), Revenue Act of 1932, c. 209, 47 Stat. 169; Section 112(b)(1), Revenue Act of 1934, c. 277, 48 Stat. 680; Section 112(b)(1), Revenue Act of 1936, c. 690, 49 Stat. 1648; Section 112(b)(1), Revenue Act of 1938, c. 289, 52 Stat. 447; Internal Revenue Code of 1939, Section 112(b)(1) (26 U.S.C. 1952 ed., Section 112(b)(1)).

As explained by the House Ways and Means Committee in 1934 (H. Rep. No. 704, 73d Cong., 2d Sess., p. 13 (1939-1 Cum. Bull. (Part 2) 554, 564), gain (or loss) is to be recognized when it is represented by property "essentially like money; * * *. The calculation of the profit or loss is deferred [only] until it is realized in cash, marketable securities, or other property not of the same kind having a fair market value".

After extensively reviewing the legislative history of the statute, the Second Circuit, in the Jordan Marsh Company case, explained its purpose and operation as follows (269 F. 2d, p. 456):

Congress was primarily concerned with the inequity, in the case of an exchange, of forcing a taxpayer to recognize a paper gain which was still tied up in a continuing investment of the same sort. * * * These considerations, rather than concern for the difficulty of the administrative task of making the valuations necessary to compute gains and losses, were at the root of the Congressional purpose * * *.

That such indeed was the legislative objective is supported by Portland Oil Co. v. Commissioner of Internal Revenue, 1 Cir., 109 F. 2d 479. There Judge Magruder, in speaking of a cognate provision contained in § 112(b), said at page 488:

"It is the purpose of Section 112 (b) (5) to save the taxpayer from an immediate recognition of a gain, or to intermit the claim of a loss, in certain transactions where gain or loss may have accrued in a constitutional sense, but where in a popular and economic sense there has been a mere change in the form of ownership and the taxpayer has not really 'cashed in' on the theoretical gain, or closed out a losing venture." (All emphasis supplied.) (Footnote omitted.)

But in the instant case, by reason of the sales transaction with Standard Oil, the taxpayers' "capital invested in the real estate involved had been completely liquidated for cash to an amount equal to the value of the fee. This * * * was a sale" (Jordan Marsh Co. v. Commissioner, supra, p. 456).

While, as the taxpayers point out (Br. 28-32), a contemporaneous sale and reinvestment leaves a taxpayer (but not the buyer) in essentially the same economic position as does a direct exchange--in the sense that after they occur he still has his capital invested in the same type of property as he did before--that is only one of the effects of an exchange.^{8/} The taxpayers' argument fails to grasp the fundamental and controlling principle that once a sale is effected and cash-like gains thus realized, the underlying justification and rationale for not recognizing gains--upon the non-cash conversion of similar property investments--is inapplicable. Once a sale is effected and a cash gain thus realized, a contemporaneous purchase of similar property--whether or not conducted through a common broker--does not qualify the two transactions as a nontaxable exchange under Section 1031. Coastal Terminals, Inc. v. United States, 320 F. 2d 333, 337 (C. A. 4th, 1963); Trenton Cotton Oil Co. v. Commissioner, supra, p. 36; Jordan Marsh Co. v. Commissioner, supra, p. 455. Here, the taxpayers--or the title company on their behalf--received from Standard Oil the equivalent of cash or the right thereto, over which they had dominion and control, pursuant to the sales transaction with Standard Oil.

^{8/} In a qualifying exchange however, the net effect is necessarily the same for both parties to the transaction. That is, if "like kind" properties are exchanged, both parties hold property immediately after the transaction similar to that which they held prior thereto. As hereafter more fully explained, that was not the situation here, because the Sharons neither held nor had the right to hold 571 Market Street for any purpose--not even momentarily. Instead, all they obtained was the right to receive the proceeds for the Sharon Building upon its sale.

Contrary to the taxpayers' argument (Br. 29), in a qualifying exchange transaction the taxpayers would have no such sales proceeds to use and control in order to effect a contemporaneous purchase of other property. When the taxpayers used these amounts thus received, or the right thereto to acquire the Sharon Building, they in effect made an anticipatory assignment of income (here capital gains) already realized in cash or its equivalent from the sale of 571 Market Street. In no way were they effecting an exchange of like kind properties within the meaning of Section 1031(a). Commissioner v. P. G. Lake, Inc., 356 U. S. 260, 263-264, 267-268 (1958), rehearing denied, 356 U. S. 964.

The purpose and necessity of restricting Section 1031 to direct exchanges are clear. Direct exchanges of similar properties, unlike sales transactions, do not yield cash proceeds (or the right thereto). Neither do they result--in any significant sense--in losses. See Jordan Marsh Co. v. Commissioner, supra, p. 456. Further, since the recipient of a taxpayer's property in an exchange transaction has to have like kind property with which to effect the exchange, direct exchanges are sufficiently rare that Section 1031 probably does not result in so many instances of tax deferral (or avoidance) as to create a serious erosion of the capital gains tax base. By contrast, in a sales transaction (whether or not accompanied by a reinvestment) a taxpayer-seller has the right to receive cash and thus realizes gain (or loss) in a significant, practical sense (which he may use to acquire other property). Further, sales and contemporaneous purchases of similar property are easily arranged--whether or not through a common broker or escrow holder--and are certainly not uncommon. If Section 1031, then--contrary to the meani

of "exchange" therein as shown by its legislative history and as consistently interpreted by the courts--were construed to apply to sale-reinvestment transactions, capital would be readily pyramided without the payment of any capital gains tax on significantly realized gains by those fortunate enough to be able to sell and immediately reinvest the proceeds (and other funds) in similar investment properties.^{9/} That result was not what Congress either intended or provided for when, in enacting Section 1031 (and its predecessors), it restricted the non-recognition of gains or losses to those incurred upon exchanges.

The strict exchange requirement of Section 1031, which encompasses voluntary transactions covering a wide variety of like kind business and investment properties, is to be contrasted with the more liberal sale-reinvestment or exchange provisions of Section 1034, which applies only to residential properties, and of Section 1033, which applies only to involuntary conversions. Under Section 1034, gain is not recognized either upon a sale of residential property where the similar property is purchased within one year or upon the exchange of such properties. Similarly, under Section 1033(b), gain is not recognized upon the "sale [and subsequent replacement] or exchange of such property under threat or imminence of requisition or condemnation". Congress,

^{9/} The unrecognized gains will be recognized only if and when the properties acquired are disposed of in a taxable transaction. See Section 1031(d) and fn. 6, supra. Where, however, such properties are not so disposed of before death, the estate or heir takes as their bases for such properties their then fair market value. Section 1014(a). Accordingly, in that event it is possible that taxes on the unrecognized gains will be avoided altogether.

then, in Sections 1033 and 1034, has carefully selected those particular instances where gain will not be recognized upon a sale and reinvestment of the proceeds in similar property. Both of those provisions are of specifically limited application and each of them covers situations where practical necessity and specific policy considerations justify the non-recognition of gains upon sale-reinvestment transactions. By contrast, under Section 1031, because of the frequent and general application of that provision--in terms of the types of property covered in voluntary transactions--any relaxation of the exchange requirement would result in great tax deferrals (or avoidance) on cash gains which would be entirely unjustified.

In the circumstances, effect should be given to the language deliberately chosen by Congress. This means that the concept of an exchange should not be strained or especially expanded to include a sales transaction coupled with a reinvestment in similar property. See Commissioner v. Brown, 380 U. S. 563, 571 (1965), affirming 325 F. 2d 313 (C. A. 9th, 1963); Hanover Bank v. Commissioner, 369 U. S. 672, 687-688 (1962); Helvering v. Rebsamen Motors, 128 F. 2d 584, 587-588 (C. A. 8th, 1942).

- C. Since the taxpayers sold their property pursuant to the option, and, moreover, since the Sharons were unwilling to acquire that property in exchange for their building, there was no exchange of properties but, instead, a sale and purchase

From the outset here, the taxpayers--considering the advantageous price offered to them by Standard Oil ^{10/} for 571 Market Street--decided that they were willing to sell at that price and, by granting Standard Oil a purchase option to accomplish that objective, committed themselves to selling that property to Standard Oil upon the exercise of the option. (IB-R. 146-147; II-R. 20-21; Ex. 4-D, IB-R. 75-76.) That option agreement unqualifiedly gave Standard Oil the right to purchase the taxpayer's property. Under that option Standard Oil did not have to agree--and in fact did not agree--to any exchange transaction in order to acquire the property from the taxpayers. Once Standard Oil exercised the option according to its terms on December 19, 1957, it was committed to purchasing the property (subject only to the condition of non-objectionable title as set forth in the option) and a contract of sale was thus created, giving Standard Oil the remedy of specific performance. E.g., see Caras v. Parker, 149 Cal. App. 2d 621, 626-627, 309 P. 2d 104, 107-108 (1957); see also Commissioner v. Brown, 380 U. S., pp. 570-571.

^{10/} While the option was granted to the title company on behalf of Standard Oil as undisclosed principal, hereafter for clarity reference is made directly to the principals to these transactions except where the context requires reference to the title company or Buckbee Thorne.

Accordingly, after December 19, 1957, the taxpayers, as they now apparently agree (Br. 19-21) held only a vendor's title to 571 Market Street, which was subject to immediate divestment upon performance of the conditions of the sales contract between the taxpayers and Standard Oil, ^{11/} coupled with a contractual right to receive the sales proceeds for the property from Standard Oil. It follows that, as the Tax Court held, by the time that the Sharons delivered their deeds to their building, along with their instructions, in escrow on January 16, 1958 (before which certainly no exchange had occurred) "it was impossible for the Sharons to obtain any ownership of 571 Market Street since the * * * [taxpayers] had already effectively disposed of that property to Standard Oil". (IB-R. 162.)

Further, the Sharons never intended to acquire 571 Market Street and thus effect the alleged exchange. Instead, they intended to sell their property for cash and that is all they ever agreed to.

Contrary to the taxpayer's argument (Br. 15) the taxpayers and Sharons never agreed in early December, 1957 (or at any other time) to exchange 571 Market Street, subject to the then unexercised purchase option, for the Sharon Building. While the taxpayers executed such a proposed agreement, the Sharons failed to sign it. (IB-R. 148-149, 158-159; Ex. 39, IB-R. 142-143; see also II-R. 27-33). Their reason for failing to sign it is clear. As the Sharons' subsequent escrow instructions of January 16, 1958 show, they were unwilling to receive 57

^{11/} See Shreeves v. Pearson, 194 Cal. 699, 707, 230 Pac. 448, 451 (1924) Todd v. Vestermark, 145 Cal. App. 2d 374, 377, 302 P. 2d 347, 349 (1956) see generally, Pederson, Escrows--Defalcation of Escrow Holder--Allocation of Loss to Vendor or Vendee--Agency and Trust Theories, 31 Or. L. Rev. 218 (April, 1952).

Market Street subject to the unexercised option (plus cash) in exchange for their building, and never intended to and never did enter into such an agreement. As disclosed by their initial approach to the taxpayers (II-R. 23-26), the Sharons wanted to sell the Sharon Building for cash and their escrow instructions carried out that intention. Those instructions, which, coupled with the taxpayers' instructions, embodied the only agreement ever made between the parties (Caras v. Parker, 149 Cal. App. 2d. 621, 626-627, 309 P. 2d 104, 107-108 (1957); see IB-R. 158-159) make no mention of any such exchange subject to an unexercised option. Instead, those instructions unequivocally provide, inter alia, that a conveyance of the Sharon Building was to be made to the taxpayers only after Standard Oil had purchased 571 Market Street by exercising its option and had paid into escrow the sales proceeds therefor and after the taxpayer had paid into escrow an additional \$368,750 for the Sharon Building. (Exs. 21-U, 22-V, IB-R. 104-110.)^{12/} In other words, the

^{12/} Those instructions provided, inter alia (Ex. 21-U, IB-R. 104-105, as modified by Ex. 22-V, IB-R. 109):

The Agent hereby authorizes you to deliver the deeds constituting Enclosure "A" to John M. Rogers and Gladys B. Rogers, his wife, hereinafter referred to as the "Rogers," upon the following terms and conditions:

1. When you hold for the account of the Owners the sum of * * * [\$1,118,750] together with such additional sums which may be due the Owners as set forth below, less any amounts which you are directed to withhold from said sum as set forth below.

(continued on next page)

Sharons committed themselves to conveying their building only upon the receipt of cash therefor, as distinguished from committing themselves to conveying their building in exchange for 571 Market Street (plus cash). (IB-R. 160.) Such a conveyance for all cash is a sale, not an exchange. Trenton Cotton Oil Co. v. Commissioner, 147 F. 2d p. 36; see Commissioner v. Brown, 380 U. S., pp. 570-571. It follows that the Tax Court was correct in holding that the taxpayers did not convey 571 Market Street to the Sharons and that their escrow instructions--and those of the Sharons--in authorizing a deed to 571 Market Street to be delivered to the order of the Sharons and on their order to Standard Oil "were mere formal matters which do not reflect the substance of the transaction, as pointed out hereinabove". (IB-R. 162.)

Indeed, on January 31, 1958, the title company--carrying out its prior obligations pursuant to the contract of sale and the instructions it had received from Standard Oil (Exs. 4-D, 14-N, IB-R. 75-76, 89-96) formally conveyed title to 571 Market Street directly from itself to Standard Oil (IB-R. 154; Ex. 36-JJ, IB-R. 139). Since the taxpayers

(Footnote 12 continued)--

2. It is understood that * * * [\$368,750] of such sum is to be received by you from the Rogers and \$750,000.00 is to be received by you from a purchaser of the parcel of real property situated in the City and County of San Francisco and more particularly described as follows:

* * * [Description omitted]

have never challenged that conveyance, they must be deemed to have ratified it as correctly reflecting the substance of the transaction ^{13/} between themselves and Standard Oil.

In summation of this point, the Sharons were unwilling to agree and never agreed to receive 571 Market Street (plus cash)--instead of cash--in exchange for their building. Further, even if it be assumed, arguendo, that the taxpayers still held a vendor's title to 571 Market Street on January 16, 1958, to convey to the Sharons, the substance of their agreement did not involve any such transfer, or any type of an exchange of the two properties.

D. In any event, since the taxpayers had effectively disposed of their building--as like kind investment property--pursuant to the option, they could not possibly have effected an exchange of like kind property with the Sharons

The taxpayers argue (Br. 19-20, 22) that on January 16, 1958, they held a vendor's title to the property, subject to the sales contract between Standard Oil and themselves, and that pursuant to the escrow instructions that title was conveyed to the Sharons. As stated in Part C, supra, that aspect of the escrow instructions does not reflect the substance of the transaction between the taxpayers and the Sharons. But, assuming, arguendo, both that: (1) the directions in the escrow instructions to convey title to 571 Market Street to the order of the

^{13/} As explained in Part D, infra, title to 571 Market Street actually vested in Standard Oil much earlier than January 31, 1958, and, in all probability, prior to January 16, 1958.

Sharons and on their order to Standard Oil (Exs. 13-M, 21-U, 22-V, IB-R. 87-88, 104-110) are to be taken at face value and (2) the taxpayers still held a vendor's title on January 16, 1958, any such exchange would not be covered by Section 1031(a). In that event, the taxpayers could convey only a vendor's title, subject to divestment upon the performance of the conditions of the sales contract between Standard Oil and the taxpayers, and their contractual right to receive the sales proceeds for their property from Standard Oil. That contractual right, the valuable property right to be granted to the Sharons in exchange for their building, was a chose in action, not investment property.^{14/} Such a contractual right to cash cannot qualify as like kind property under Section 1031(a). Commissioner v. P. G. Lake Inc., 356 U. S. 260, 263-264, 267-268 (1958), rehearing denied, 356 U. S. 964.

Moreover, legal title to 571 Market Street vested in Standard Oil, directly from the title company, as escrow holder when the condition of the sales contract--as set out in the option (Ex. 4-D, IB-R. 75-76), and reflected in Standard Oil's instructions to the title company (Ex. 14-N, par. 3, IB-R. 91-93) (namely, a determination by that company that title to the property was non-objectionable)--was satisfied. When that condition was satisfied then the title company became the agent of each party "in respect to those things placed in escrow to which each

^{14/} There is no question but that such a contractual right can be assigned. See Mutual Benefit Life Ins. Co. v. Clark, 81 Cal. App. 546, 553, 254 Pac. 306, 309 (1927); W. H. Marston Co. v. Fisheries Co., 201 Cal. 715, 723, 258 Pac. 933, 936 (1927).

has become completely entitled. * * * he thereupon becomes the agent of the purchaser as to such deed and of the seller as to such [purchase] money" (Shreeves v. Pearson, 194 Cal. 699, 707, 230 Pac. 448, 451 (1924)) and "title passes eo instanti" (Todd v. Vestermark, 145 Cal. App. 2d 374, 377, 302 P. 2d 347, 349 (1956)).^{15/} See generally, Pederson,

Escrows--Defalcation of Escrow Holder--Allocation of Loss to Vendor or Vendee--Agency and Trust Theories, 31 Or. L. Rev. 218 (April, 1952).

Here, as the Tax Court indicated (IB-R. 162, fn. 7), while the exact date that this condition was satisfied is not known, the evidence of record strongly suggests that that date was probably as early as January 2, 1958, and in any event, occurred before January 16, 1958, and that the formal closing "was deferred [either] to accommodate the sellers" (Ex. 32-FF, IB-R. 133; see also II-R. 46-47, 64-65) or for technical reasons until January 16, 1958 (II-R. 73; see also IB-R. 154).

Accordingly, we contend that it was impossible for the taxpayers to effect any kind of any exchange, even one involving a vendor's bare legal title to 571 Market Street, which would not qualify as an exchange under Section 1031 in any event, with the Sharons on January 16, 1958. (See Br. 23, 26, 32, compare IB-R. 163-164.)

^{15/} The taxpayers had delivered a deed to the title company conveying 571 Market Street to that company on December 17, 1957. (IB-R. 150; Ex. 12-L, IB-R. 86.) Standard Oil delivered the balance of the entire purchase price money by check (less the previously paid option payment and down payment) to the title company in escrow on December 20, 1957. (IB-R. 151; IA-R. 22-23.)

The cases relied on by the taxpayers (Br. 23, 26, 32) are distinguishable on their facts from the instant case (see IB-R. 163-164. For example, in Alderson v. Commissioner, 317 F. 2d 790 (1963), this Court, in holding that the alleged exchange had occurred, relied extensively on the Tax Court's finding that Alloy, the other party to the transaction, actually acquired title to the exchange property (the Salinas property), albeit solely to effectuate the exchange that had been agreed upon. This Court held that this underlying purpose--with Alloy not acquiring a real interest in the property in the sense of actually intending to assume and assuming the benefits and burdens of ownership--did not disqualify the exchange, since in fact Alloy did become the owner of the property. If what was done, this Court reasoned aside from the purpose of avoiding tax, is encompassed by the statute, the transaction qualifies thereunder. See Alderson v. Commissioner, supra, pp. 793-794. To the same effect is Coastal Terminals, Inc. v. United States, 320 F. 2d 333 (1963), where the Fourth Circuit similarly made it clear (p. 336) that the findings of the trial court as to the passage of title and the presence or absence of an exchange are to be sustained unless clearly erroneous. Here, the Tax Court specifically found and held that the taxpayers never conveyed 571 Market Street to the Sharons and that the alleged exchange never occurred. In the light of the evidence of record, that holding is clearly correct.

As we stressed at the outset (Part B, supra), it must constantly be borne in mind that Section 1031 applies only to exchanges, and not to contemporaneous sales and purchases. Where two parties, both of whom

hold like kind properties with high basis and low fair market values, directly exchange their properties, their losses are essentially theoretical and no loss deductions are allowed pursuant to Section 1031. But once they realize a cash loss upon the disposition of their properties--just as the taxpayers here realized a cash gain on the sales transaction with Standard Oil--regardless of any simultaneous investment in similar property, the transaction must be recognized for tax purposes. See Jordan Marsh Co. v. Commissioner, 269 F. 2d 453, 455 (C. A. 2d, 1959); H. Rep. No. 704, 73d Cong., 2d Sess., p. 13 (1939-1 Cum. Bull. (Part 2), 554, 564).

CONCLUSION

For the reasons stated above, the decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1966.

Edward Lee Rogers
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FEB 14 1967

No. 20621

In the

United States Court of Appeals

For the Ninth Circuit

JOHN M. ROGERS and JOHN M. ROGERS,
Executor of the Estate of Gladys B.
Rogers, deceased,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petitioners' Reply Brief

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I.

INTRODUCTORY STATEMENT

The most significant aspect of respondent's 37 page brief is that respondent's analysis of the case of *Alderson v. Commissioner*, 317 F.2d 790 (9th Cir. 1963) begins and ends on page 36. Respondent's attempt at distinguishing *Alderson* is futile, for respondent concedes, as it must, that this Court held in *Alderson* that Section 1031(a) was satisfied even though Alloy, one of the two parties to the exchange,

never acquired any real interest in the property exchanged by it, even though taxpayer had previously entered into a contract to purchase that property from a third party (the Salinas owner), and even though the transaction was arranged in the form of an exchange by the taxpayer for the purpose of tax avoidance. Respondent's sole ground for distinguishing *Alderson* is that Alloy "actually acquired title to the exchange property," even though such title was immediately reconveyed to taxpayer. As we pointed out in our opening brief, by virtue of petitioners' and the Sharons' escrow instructions, which must be presumed to have been carried out in full accordance with their terms, the Sharons likewise acquired title to 571 Market Street, although, like Alloy in *Alderson*, such title was immediately reconveyed. The fact that the Sharons' acquisition of title and the reconveyance thereof was ultimately handled by the escrow holder, for its own internal reasons, in the form of a single recording transaction, obviously is without significance.

Respondent contends that Standard Oil's contractual rights with respect to 571 Market Street somehow prevented the Sharons from acquiring title thereto. The simple and conclusive answer to this premise is that even if Standard Oil had at some time acquired a contractual right to the property, that would not prevent the passage of title to the Sharons, as the cases cited in petitioners' opening brief point out. Thus, the instant case fits squarely within the *Alderson* rule.

Keeping in mind the fact that the *Alderson* case must ultimately control the disposition of this matter, we will in the pages which follow meet the various other points which respondent has raised. None of these points in any way brings this case outside the scope of the *Alderson* decision.

**PETITIONERS DIRECTLY EXCHANGED 571 MARKET STREET
FOR THE SHARON BUILDING**

In part C of its brief, respondent attempts to meet petitioners' primary contention that a direct exchange was in fact consummated between petitioners and the Sharons.

Respondent's first point is that petitioners "committed themselves" to selling 571 Market Street to Standard Oil by granting it an option to purchase that property, and that such option "unqualifiedly" gave Standard Oil the right to purchase that property. As we have already pointed out (P.B. 15, 20-21), neither the granting of the option nor the subsequent exercise thereof in any way prevented petitioners from conveying title to 571 Market Street to the Sharons, who took title to that property subject to whatever contractual rights Standard Oil might have. Respondent does not discuss the cases and authorities set forth in petitioners' opening brief, nor does it dispute the validity of their holding. The conveyance of 571 Market Street by petitioners to the Sharons was neither invalid nor a breach of contract as respondent suggests. The law is clear that there is an unqualified right to convey property subject to an outstanding option or other contractual right. Such a conveyance was made here, and Standard Oil's rights were fully protected by the conveyance to the Sharons.

Respondent argues that Standard Oil did not have to agree, and did not agree to the exchange. (R.B. 29). We pointed out that in fact the evidence shows that Standard Oil and its agent, Cal Pac, fully acquiesced in the exchange. (P.B. 21). But aside from that, such acquiescence was unnecessary, since petitioners had the legal right to convey title to their property to the Sharons.

Respondent argues that petitioners' title to 571 Market Street "was subject to immediate divestment upon the per-

formance of the conditions of the sales contract between the taxpayers and Standard Oil.” (R.B. 30). But the very cases relied upon by respondent to support this position refute this contention. For example, *Todd v. Vestermark*, 145 Cal. App. 2d 374, 377, 302 P.2d 347, 349 (1956), points out that the title to property passes only when all conditions contained in the parties’ escrow instructions have been carried out. Petitioners’ escrow instructions authorized Cal Pac to deliver a deed to 571 Market Street only *to the order of the Sharons*, upon vesting title to the Sharon Building in petitioners. The Sharons’ escrow instructions authorized Cal Pac to reconvey 571 Market Street *on behalf of the Sharons* to Standard Oil. The *Todd* case, and the other cases cited by petitioners (P.B. 22) hold that such escrow instructions must be carried out in full accordance with their terms and that a deed delivered contrary thereto is void. Therefore, while Standard Oil, at some time subsequent to the exercise of its option, may have established a contractual right to 571 Market Street upon complying with the various terms and conditions of the option agreement, title to the property remained in petitioners at all times prior to January 16, 1958, at which time it passed to the Sharons, in accordance with petitioners’ escrow instructions.

Respondent correctly points out that on January 31, 1958, Cal Pac conveyed title to 571 Market Street “*directly* from itself to Standard Oil.” But respondent’s conclusion that petitioners “must be deemed to have ratified that conveyance” (R.B. 32-33) is pure nonsense. Cal Pac, in a letter dated January 29, 1958, confirmed the fact that the exchange had been effected prior to that time, stating that petitioners had acquired the Sharon Building “in consideration of the sum of \$400,000.00 and the exchange of Market Street property, which was sold in the same transaction, for a

consideration of \$750,000.00" (C.T. 154; Exh. 35-11, C.T. 138).

Respondent's final argument is that the Sharons "never intended" and "were unwilling" to acquire 571 Market Street subject to an unexercised option. Respondent bases its contention upon the fact that the Sharons' escrow instructions, dated January 16, 1958, "make no mention of any such exchange subject to an unexercised option." (R.B. 31). What respondent fails to point out is that Standard Oil had exercised its option nearly a month before these instructions were delivered. (C.T. 150-151; Exh. 14 N, C.T. 89). To contend that any inference can be drawn from the fact that the Sharons simply recognized an accomplished fact, rather than ignoring that fact, is the purest sophistry. The Sharons, realizing that Standard Oil had exercised its option, simply combined a two-step transaction into one set of escrow instructions to provide for the conveyance of the Sharon Building to petitioners in exchange for 571 Market Street and \$400,000 cash from petitioners, and the subsequent sale of 571 Market Street *on behalf of the Sharons* to Standard Oil.

At any rate, the evidence is uncontradicted that petitioners and the Sharons *negotiated* on the basis of an exchange of the Sharon Building for 571 Market Street, subject to the unexercised option (C.T. 147-148; R.T. 25-27), that the Sharons actually made an *offer* to value the Sharon Building at \$1,150,000 for purposes of such an exchange (C.T. 148; R.T. 25-27), that the Sharons, through their agents Coldwell-Banker & Co., prepared an *agreement* setting forth the details of such an exchange, which petitioners executed (C.T. 148-149; R.T. 29; Exh. 39, C.T. 142), that in accordance with the terms of such agreement the Sharons *opened an escrow* for purposes of consummating the ex-

change (C.T. 149; R.T. 29), and that petitioners placed into that escrow their *deed* to 571 Market Street accompanied by escrow instructions authorizing delivery of that deed *to the order of the Sharons* upon vesting title to the Sharon Building in petitioners (C.T. 150; Exh. 12-L, 13-M, C.T. 86, 87). *All these events occurred before Standard Oil had exercised its option.* Clearly, these facts preclude any inference that the Sharons and petitioners were bargaining on the basis of a sale of the Sharon Building, as respondent contends.

The uncontroverted facts compel the conclusion that the Sharons' escrow instructions, together with petitioners' instructions, were carried out by Cal Pac, and that an exchange of properties was accomplished prior to Standard Oil's acquisition of 571 Market Street from the Sharons. Having acquired title from petitioners, it is insignificant that the Sharons acquired no real interest in the property, as we pointed out in our discussion of this Court's decision in *Alderson v. Commissioner*, 317 F.2d 790 (9th Cir. 1963), at pages 24-25 of our opening brief. Indeed, respondent apparently concedes that if the Sharons acquired title to 571 Market Street, the transaction would qualify under the *Alderson* rule. (R.B. 36).

III.

SECTION 1031(a) APPLIES TO CERTAIN SIMULTANEOUS SALES AND PURCHASES IN ESCROW

In petitioners' opening brief, pages 28 through 32, we set forth an alternative argument based upon the theoretical assumption that the Tax Court correctly held that the instant transaction took the form of a simultaneous sale and purchase. In part B of its brief, respondent attempts to meet petitioners' alternative theory, employing the familiar "parade of horrors" argument and stating that if peti-

tioners' interpretation of Section 1031(a) is accepted, it will open wide the floodgates and create a "serious erosion of the capital gains tax base," and a "pyramiding" of tax-free capital.

There are two sufficient answers to respondent's contention. First, petitioners have never suggested that Section 1031(a) should apply to all situations involving sales and subsequent purchases, or even to all situations involving simultaneous sales and purchases. Petitioners do strongly urge that in real estate transactions involving common escrow agents and simultaneous transfers of property, the intent of the parties and the net effect of the transactions should control over the bare form these transactions take. (P.B. 31-32).

Second, it should be quite clear that such an interpretation will not lead to any further "erosion" of the tax base, for the courts unquestionably sanction the use of conduit transactions whereby tax-free exchanges are effected by arranging for the other exchanging party to acquire paper title to the property desired by the taxpayer.

Let us explore each of these points in greater detail. We will assume, solely for purposes of argument, that the Tax Court correctly held that the form of the instant transaction was a "sale" of 571 Market Street by petitioners to Standard Oil, and a simultaneous "purchase" of the Sharon Building by petitioners from the Sharons out of the proceeds of that sale.

It is clear that this situation meets all the tests of the cases upon which respondent so heavily relies, *Jordan Marsh Company v. Commissioner*, 269 F.2d 453, 456 (2d Cir. 1959), and *Trenton Cotton Oil Co. v. Commissioner*, 147 F.2d 33 (6th Cir. 1945), cited by respondent at pages 22-25 of its brief. Petitioners' gain remained a paper gain,

still tied-up in like property, and not realized in a popular or economic sense, but merely theoretical in nature. Moreover, this situation likewise meets all the tests of the recent case of *Coastal Terminals, Inc. v. United States*, 320 F.2d 333, 337 (4th Cir. 1963), discussed by petitioners at pages 30-32 of their opening brief. Petitioners *intended* to effect an ultimate exchange, and the *net effect* of the transaction was an exchange.

This situation is entirely different from the ordinary sale and reinvestment situation postulated by respondent, where the reinvestment or subsequent purchase is totally unrelated and unrestricted by the original sale, and where the decision to reinvest is made *after* the proceeds or right to proceeds from that sale have accrued. In those situations, the gain is no longer "tied-up," taxpayer has "cashed in" on his investment, and the fact that he voluntarily chooses to reinvest the proceeds in like property should not alter the tax consequences arising therefrom. In the words of Mr. Green of Iowa, quoted at page 23 of respondent's brief "If the property has been *reduced to cash* and there is a gain, of course it will be taxed." (Emphasis added).

However, where the taxpayer, with the intent to effect an ultimate exchange through a simultaneous transfer of properties, and before any right to sales proceeds has accrued, provides for the distribution of these proceeds directly from the purchaser of his property to the seller of the property he desires, the transaction should be treated as an exchange under Section 1031(a). The logic of this proposition becomes even more compelling when applied to escrow transactions involving common escrow holders, where the form the transactions take is largely dictated by the judgment of the escrow holder and other factors over which the parties have little or no control.

Respondent's additional arguments with respect to the scope of Section 1031(a) are without merit. Respondent, at page 25, footnote 8, suggests, without citation of authority, that an exchange cannot qualify under Section 1031(a) unless the other party to the exchange retains the property transferred to him by the taxpayer. Obviously, whether the *taxpayer* has qualified under Section 1031(a) cannot depend upon whether the other party to the exchange has or has not retained an interest in the property received from taxpayer.

Respondent asserts at page 25 that petitioners or Cal Pac received proceeds or the right to proceeds from Standard Oil over which they had dominion and control. First of all, petitioners never received any of the proceeds deposited in escrow by Standard Oil. Second, petitioners effectively placed any right to receive such proceeds beyond their reach by executing the Agreement to Exchange and performing in accordance with its terms by depositing a deed and escrow instructions into the exchange escrow before Standard Oil had exercised its option. Finally, as for Cal Pac, whatever payment it received from Standard Oil remained the property of Standard Oil all times prior to its transfer to the Sharons. (P.B. 17).

Respondent's final argument is its "erosion" point, to the effect that since sales and contemporaneous purchases of similar property are "easily arranged," the Court should adopt respondent's view of Section 1031(a) to prevent a "serious erosion of the capital gains tax base."

Let us examine this contention in detail. Assume that Mr. T, the owner of T property, desires to effect a tax-free exchange of that property for A property, owned by Mr. A. Assume further that A desires to sell A property for cash, rather than to acquire T property, and that Mr. B is willing

to purchase T property for cash. Respondent contends that if T is permitted to qualify under Section 1031(a) by arranging for a simultaneous sale and purchase of these properties in escrow, with the proceeds of the sale by A payable directly from B to A, the tax base will be seriously eroded. Respondent overlooks the fact that the law already permits T to qualify under Section 1031(a) simply by arranging for B to take title to A property and immediately to reconvey the same to T in exchange for T property. *Alderson v. Commissioner*, 317 F.2d 790 (9th Cir. 1963); *Coastal Terminals, Inc. v. United States*, 320 F.2d 333 (4th Cir. 1963); *Mercantile Trust Co.*, 32 B.T.A. 82 (1935), *acq.* XIV-1 Cum. Bull. 13; *Antone Borchard*, 24 T.C. Memo. 1643 (1965).

Countless cases, including this Court in the *Alderson* case, have held that for tax purposes substance must control over form. We maintain that simultaneous sales and purchases in escrow intended to accomplish an ultimate exchange, and having the net effect of such an exchange, should be treated no differently than exchanges effected through conduit transactions arranged in the form of an exchange for tax purposes.

Therefore, even if this Court were to agree with the Tax Court that petitioners and the Sharons did not effect a direct exchange of their property, we maintain that under the particular facts of this case, the transaction should be treated as an exchange under Section 1031(a).

IV.

PETITIONERS DID EFFECT A LIKE KIND EXCHANGE UNDER SECTION 1031(a)

In part D of its brief, respondent raises an argument not made before the Tax Court and attempts to demon-

strate that, even though "(1) the directions in the escrow instructions to convey title to 571 Market Street to the order of the Sharons and on their order to Standard Oil . . . are to be taken at face value and (2) the taxpayers still held a vendor's title on January 16, 1958," an exchange qualifying under Section 1031(a) was not effected because there was no exchange of properties of a "like kind."

Respondent then proceeds to base its argument with respect to the "like kind" requirement on a total disregard of the escrow instructions of petitioners and the Sharons, and a denial, grounded on such disregard, that petitioners held title to 571 Market Street on January 16, 1958. Respondent briefly recites some general law with respect to escrows and escrow holders and passes immediately to the conclusion that title to 571 Market Street passed to Standard Oil "in any event, . . . before January 16, 1958," and that, therefore, no exchange of like kind property could have occurred on January 16, 1958.

The only basis offered for this conclusion appears in footnote 15 on page 35 of respondent's brief. Therein respondent states that "the taxpayers had delivered a deed to the title company conveying 571 Market Street to that company on December 17, 1957. . . . Standard Oil delivered the balance of the entire purchase price money by check . . . to the title company in escrow on December 20, 1957." Though purporting to take petitioners' (and the Sharons') escrow instructions at face value, respondent fails to mention in said footnote 15 that petitioners' escrow instructions to Cal Pac, which accompanied transmittal of its deed to Cal Pac, specifically instructed Cal Pac "to deliver said deed to the order of Hurford C. Sharon, et al.," when Cal Pac had vested title to the Sharon Building in petitioners, and in no way authorized a delivery of that deed to Standard

Oil, or to Cal Pac acting on behalf of Standard Oil. Cal Pac's only authorization to deliver the deed to 571 Market Street to Standard Oil or to its order came from the Sharons, and was specifically conditioned upon receipt by Cal Pac, on behalf of the Sharons, of a conveyance of 571 Market Street from the petitioners, and receipt by Cal Pac, for the account of the Sharons, of the option price from Standard Oil.

Thus, delivery of a deed to 571 Market Street from Cal Pac to Standard Oil or its order, whenever such delivery occurred, was made possible only because, prior to such delivery, an exchange of 571 Market Street and the Sharon Building between petitioners and the Sharons had been consummated pursuant to the escrow instructions of the petitioners and the Sharons. Cal Pac could not have made such a delivery prior to the consummation of the exchange. This is amply demonstrated by *Todd v. Vestermark*, 145 Cal.App.2d 374, 377, 302 P.2d 347, 349 (1956), the case relied upon by respondent on this point:

"It is established in this state that the terms and conditions of an escrow must be strictly performed. [Citing, among others, *Los Angeles High School Dist. v. Quinn*, 195 Cal. 377, 234 Pac. 313 (1925), the case cited by petitioners on this same point at page 22 of their opening brief.] The doctrine of substantial performance does not apply. [Citations.] The escrow holder is agent for both parties at all times prior to performance of the conditions of the escrow, but when that event transpires '... the nature of this dual agency changes to an agency not for both, but for each of the parties to said transaction in respect to those things placed in escrow to which each has thus become completely entitled.' [Citations.] When the conditions have been fully performed, title passes *eo instanti* and recordation of documents operates to evidence the passing of title

previously accomplished. [Citations.] *On the other hand, a delivery or recordation by or on behalf of the escrow holder prior to full performance of the terms of the escrow is a nullity.* [Citations.]” [Emphasis added.]

Thus, if the escrow instructions of the petitioners and the Sharons are “taken at face value” (and *Todd* shows that they cannot be taken otherwise), it is unquestionable that the exchange of 571 Market Street for the Sharon Building was consummated before the deed to 571 Market Street was delivered to Standard Oil by Cal Pac acting on behalf of the Sharons.* Respondent’s arguments fail to prove that a “like kind” exchange did not occur and in fact, when the content of the escrow instructions are kept in mind, conclusively prove that such an exchange did occur.

Respondent also states that petitioners had a right to assign “their contractual right to receive the sales proceeds for their property from Standard Oil.” Of course petitioners could have structured the transaction so as to make such an assignment. It is clear that petitioners could have chosen not to negotiate and consummate an exchange with the Sharons, and instead could have retained 571 Market Street and consummated a contract of sale and purchase with Standard Oil, assigning the right to the proceeds from such a sale to the Sharons or someone else. These things might have been done. They were not done. Instead, as has been demonstrated above, petitioners never consummated any such contract and never assigned any right to sales proceeds to anyone: *Before* Standard Oil exercised

*That title to 571 Market Street remained in petitioners, up to January 16, 1958, is further evidenced by the fact that petitioners, with full knowledge of all parties, received and retained rentals on that property accruing on or before that date. (C.T. 154.) Respondent’s argument conveniently ignores this admitted fact.

its option, petitioners executed an exchange agreement and, pursuant thereto, deposited in escrow a deed to 571 Market Street together with escrow instructions requiring delivery of that deed to the Sharons. *Before* the Sharons effected a sale of 571 Market Street to Standard Oil, the exchange of 571 Market Street for the Sharon Building was fully consummated, in accordance with the escrow instructions of petitioners and the Sharons. Respondent does not deny that petitioners had every right to effect such an exchange:

“As long as legal title remains in the vendor it may be conveyed by him, and a vendor under an executory contract for the sale of land may sell to a third person the land covered by the contract, at the same time assigning the contract, or he may merely convey the land subject to the prior rights of the purchaser under the contract.” 50 Cal.Jur.2d, *Vendor and Purchaser*, sec. 133, at p. 172 (1959).

This being the case, *Commissioner v. P. G. Lake, Inc.*, 356 U.S. 260 (1958), rehearing denied, 356 U.S. 964, is inapplicable to this case.*

*Petitioners also would point out that the decision in *Lake* did not turn upon the question whether “a contractual right to cash can qualify as like kind property under Section 1031(a).” In *Lake*, five cases involving partial assignments of oil payment rights were consolidated for trial since in each the contention was that gains realized on such assignments were taxable at capital gain rates. One of those cases also raised the question whether such an assignment in return for real property qualified under the predecessor to section 1031(a) and entitled the taxpayer to postpone the capital gain. The Court viewed the arguments of the taxpayers as attempts to convert ordinary income into capital gains, holding that, in view of the limited nature of the assignments, the rights which were being assigned were rights to *ordinary* income. Thus these partial assignments did not constitute “conversions of capital investments” and any gain realized was ordinary income. It followed that an exchange of real estate for such a non-capital asset did not qualify under the predecessor to section 1031(a). Here respondent is not contending that petitioners are converting ordinary income into capital gain. On the contrary, respondent’s position is that petitioners realized and must recognize capital gain.

The purpose of the "like kind" requirement is to allow an exchange to qualify as tax free under section 1031(a) only when the taxpayer's investment remains essentially unchanged after the exchange. As the Court in *Lake* pointed out:

"[T]he 'underlying assumption . . . is that the new property is substantially a continuation of the old investment still unliquidated.'" [356 U.S. at p. 268, quoting from the regulations to the predecessor section of section 1031(a).]

See also *Jordan Marsh Company v. Commissioner*, 269 F.2d 453, 455 (2d Cir. 1959), quoted at pages 28-29 of petitioners' opening brief.

There can be no question that 571 Market Street and the Sharon Building were both office buildings held as rental income investment property by their respective owners prior to January 16, 1958,* were, therefore, "like kind" properties, were exchanged for each other on January 16, 1958, and that petitioners thereafter held the Sharon Building for the same purposes they had previously held 571 Market Street. Thus, the interjection of the "like kind" argument, an argument not raised in the Tax Court and apparently raised here as an afterthought, does not avail respondent, and merely serves to confuse the sole issue before the Court—does the transaction between petitioners and the Sharons qualify as a tax-free exchange under section 1031(a). Petitioners urge that this question must be answered in the affirmative.

*That petitioners so held 571 Market Street until January 16, 1958 is demonstrated by the fact that petitioners received and retained all rentals accruing on the property up to that date. (C.T. 154.)

Petitioners respectfully submit that the decision of the Tax Court herein was incorrect and should be reversed.

Dated: May 24, 1966.

EDWARD J. RUFF
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MICHAEL L. MELLOR

FEB 14 1967

No. 20,641 /

IN THE
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA and BAKER AIRCRAFT SALES, INC., <i>Defendants-Appellants,</i> vs. BETTY K. FURUMIZO, <i>Plaintiff-Appellee and</i> <i>Cross-Appellant.</i>	}
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BRIEF ON BEHALF OF APPELLANT
BAKER AIRCRAFT SALES, INC.

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BRIEF ON BEHALF OF APPELLANT
BAKER AIRCRAFT SALES, INC.

JURISDICTION

The jurisdiction of the District Court was based upon Title 28 United States Code Section 1332, 1346 (b) and 2671 et seq. The jurisdiction of this Court rests on Title 28 United States Code Section 1291. Judgment was entered June 22, 1965 (R. 614).¹

¹All references to pages in this brief will be according to the pages appearing in the transcript of record on appeal dated December 27, 1965, and signed by William F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, since counsel has no means of ascertaining whether or not a different paging was used by the Clerk of the Court of Appeals, references to evidence will be on the basis of transcript paging since there is not available to counsel in Honolulu the record paging of the transcript of evidence.

Motions for new trial were timely filed (R. 628-633) and on October 1, 1965, an order was entered denying the motions for new trial (R. 693). Notice of appeal was filed by appellant Baker Aircraft Sales, Inc., on November 29, 1965 (R. 706-7).

STATEMENT OF THE CASE

This action was brought in the Court below by Betty K. Furumizo, the appellee, in three capacities: personally, as guardian ad litem for her minor daughter, and as administratrix of her deceased husband Robert Takeo Furumizo (amended complaint and summons, R. 12-16) seeking to recover damages for the death of her husband, the father of her minor child in question. Claims for death by wrongful act are governed by Section 246-2, Revised Laws of Hawaii, 1955.

The basic facts pertaining to the accident itself are set out in great detail in the decision below (R. 544-613). They are basically undisputed. On June 19, 1961, shortly before 7:00 p.m., Honolulu time, the decedent, Robert Takeo Furumizo was in an aircraft, Piper PA-18 Super Cub 95, owned by the defendant Baker Aircraft Sales, Inc. He was receiving dual instruction at and around Honolulu International Airport from an instructor of the defendant Baker Aircraft Sales, Inc., Charles Isamu Shima. The Piper was shooting a series of touch and go landings on runway 4 left, which intersects runway 8, which is used for jet takeoffs. The tower transmissions which

are in evidence and which were numbered during the course of trial show the following transmissions which are of significance here:

- 14. Piper 99 Zulu continue approach now for 4 left. DC-3 right base the other runway.
- 19. Piper 99 Zulu make this a full stop, hold short of 8 if possible.
- 28. Piper 99 Zulu, pull ahead slightly, allow the DC-3 to pass behind you.
- 30. Japan Air 8005 wind of north north-east 6, cleared for takeoff.
- 32. Japan Air 8006 cleared for takeoff.
- 37. Piper 99 Zulu, hold your position.
- 43. Air Force 6338, caution, turbulence departing DC-8 cleared for takeoff.
- 44. Piper 99 Zulu, caution turbulence departing DC-8 cleared for takeoff.

At the point that this transmission was given, the Piper Cub was on runway 4 left, approximately 1,000 feet from the intersection of 4 left and runway 8 and the DC-8 had just crossed that intersection. The Piper Cub commenced its landing role and took off and made a normal climb to a height of about 75 feet when it reached the intersection, rolled to the right, crashed on its right wing and burst into flames. Both the occupants were killed.

As is noted in the pre-trial order (R. 371-380):

“11. At the time of the accident the Decedent had received a total of 10 hours and 45 minutes of dual instruction over a period of the imme-

ciate past 2 months, but had not yet soloed. Decedent held an FAA Student's Pilot License and a current Second-class Medical Certificate.

12. At the time of the accident the weather report taken at 18:55 HST (6:55 p.m.) was: estimated scattered clouds at 3,000 feet, visibility over 15 miles, temperature 78 degrees, dew point 66 degrees, wind 6 knots from the east northeast. Sunset on that date was at 19:16 HST (7:16 p.m.) or within 2 minutes of that time.

13. The existence of the potential hazards of turbulent wake of large aircraft to smaller aircraft was a matter of 'common knowledge' in the flying industry at the time of the accident."

The trial court found that the accident was the result of the small light Piper Cub encountering turbulence originating with the wing-tip vortices of the DC-8 of such nature that it was impossible to control the Cub, and of such violence as to cause the crash. This finding is not disputed by appellant Baker.

As noted in paragraph 15 of the pre-trial order (R. 371, et seq.):

"At the time of his death the Decedent was a GS-7 Step 2, earning \$5,520 per annum plus 17½% cost of living allowance as an electronics technician with the FAA (subject to relevance)."

Plaintiff's theory of the case with respect to appellant Baker is set forth as follows in the pre-trial order (R. 371, et seq.):

"Plaintiffs further contend that under 28 U.S.C. § 1332 as citizens of the State of Hawaii,

they have a claim in an amount exceeding, exclusive of interest and costs, the sum of \$10,000, against the Defendant BAKER as a California corporation with its principal place of business in California, for the negligence of its employee CHARLES ISAMU SHIMA (hereinafter referred to as "SHIMA") while acting within the scope of his employment, as pilot in command of the aircraft in which he was giving dual instruction for hire to the Decedent as a student pilot, in taking off or allowing the Decedent to take off directly into the jet wash of the DC-8 aforesaid in spite of his knowledge as well as a specific warning given to him of the hazard involved and in failing thereafter to maintain safe control of the aircraft under the circumstances, thereby causing the aircraft to crash, resulting in the death of the Decedent and damages to the Plaintiffs as hereinafter more fully set forth."

As noted in the pre-trial order, appellant Baker denied the allegations of negligence and set up the defenses of contributory negligence and assumption of risk on the part of decedent. On the issues as framed the case was tried.

The evidence revealed, as the pre-trial order had set forth, that decedent at the time of his death, was an employee of the Federal Aviation Administration, with the rating of GS-7, Step 2, earning a base of \$5,520 per annum, plus a 17½% cost of living allowance. Over objection, the witness Olsen was allowed to give his opinion that the decedent would have been promoted to GS-9 in September of 1963 (Tr. 1688) although he had admitted that there was a basic

assumption involved to wit that Mr. Furumizo would have gone to the Oklahoma City Academy of the FAA and would have passed his exam (Tr. 1681), and although he had stated in this respect that while he could make a conclusion that the validity thereof may or may not be highly questionable (Tr. 1677) and that he could not say whether or not Mr. Furumizo would pass the course (Tr. 1672 and 1674). As to a promotion from grade GS-9 to grade GS-11, the witness stated that in his division which was the one in which Mr. Furumizo worked, there had been no promotions from GS-9 to GS-11 in the three years which had passed since Mr. Furumizo's death (Tr. 1691) and that in order to give an answer on the question of whether or not Furumizo would be promoted from GS-9 to GS-11 he would have to make a number of assumptions which are listed in transcript on page 1694. He did not give his opinion on this subject because, as counsel and the Court conceded that there were too many assumptions involved (Tr. 1695). Over objection, the witness Wong was allowed to testify that, in his opinion, Furumizo had the capacity for an eventual promotion from GS-9 to GS-11 (Tr. 1761, 1762, 1763). His statement was "my opinion is that he would have achieved that level eventually". However, on cross-examination, it was revealed that the witness's opinion was based on an assumption of a transfer by Furumizo from installation, the organization over which Mr. Olsen had charge, to maintenance, the organization in which Mr. Wong worked (Tr. 1776 and 1782), and further that transfers from one to the other were limited by vacancies (Tr. 1783).

In the course of the trial the Government produced as a witness Emmet James Kay, Senior, a former chief flight instructor with defendant Baker Aircraft Sales. He testified that he had given Mr. Furumizo his first four or five hours of flight instruction (Tr. 568) and in the course of his instruction had instructed him on the subject of wake turbulence (Tr. 568, 569, 571, 572, 580). He also testified as to the information on the subject of wing-tip vortices which was available on the pilot's bulletin board at Baker Aircraft Sales, Inc. during the time that Mr. Furumizo was receiving his instructions (Tr. 596, 597) and that he had instructed Furumizo to read this literature (Tr. 597). He further stated that Furumizo appeared to grasp and understand the instructions which were given to him (Tr. 632).

Based on his experience as a flight instructor and as chief instructor for Hawaiian Aircraft Sales, the name under which defendant Baker did business, he stated that a student with the hours which Mr. Furumizo had at the time of the accident would normally be handling the radio in the aircraft, that the student would acknowledge the radio transmission and be the one who would make the decision to take off or not take off (Tr. 640-643). As Exhibit G8 reflects, Mr. Furumizo was first instructed by Mr. Kay and then for the last five hours or so of his training prior to the accident, by Mr. Shima, who died in the accident with him. Mr. Kay had known Mr. Shima since he was about fourteen years old (Tr. 568), he had trained Mr. Shima and was completely satisfied with

his flying ability (Tr. 592). Mr. Shima was aware of the subject of wake turbulence because he was licensed by the FAA and an oral examination is given for license as an instructor and that examination contains questions on wake turbulence (Tr. 600), therefore, to the best of the witness's knowledge, Shima had knowledge of the dangers of wake turbulence (Tr. 626). Mr. Kay stated that a student pilot, even though he had an instructor with him had perfect liberty to refuse to go when a clearance was issued (Tr. 633-634).

Mr. Carter, the then manager of defendant Baker stated that at the stage of instruction which Mr. Furumizo had reached, he would be the one actually shooting the takeoffs and landings unassisted (Tr. 816). The instructor, of course, would be following through with his hands near the controls (Tr. 816). When the plane crashed it immediately burned (Tr. 979). After the fire, Furumizo's right arm was in front of his face as if he was anticipating something, and Shima apparently had let his safety belt go and was in position to back out the door, even though the door would not open due to the fact that the plane had crashed on its right side (Tr. 800, 801). The Court in its ruling, page 14 of the decision, paragraph 35, stated:

“ . . . None of these impressed the Court in the light of all the evidence, as indicating any negligence on the part of Shima or Furumizo in the actual operation of the Piper, other than *the possibility of negligence* in taking off when the Piper did.

36. The Court's ultimate ruling in this case may be summed up thus: Baker had the duty, equal to the highest duty a commercial airline owes to its passengers, of care in furnishing instruction to Furumizo, the student pilot who had not yet soloed. Shima, the instructor pilot, although apparently otherwise well qualified, quite evidently had not sufficiently absorbed the dangers of vortex turbulence from large planes, such as the DC-8, to tiny planes like the Piper to realize that by taking off from a point as close to the intersection as it was, and crossing runway 8 at an angle of only 40 degrees, with a crosswind of the type shown, he would be almost certain to encounter such turbulence at its maximum degree of danger. Therefore Baker was negligent in not having furnished an instructor who was so fully aware of such dangers that he would have avoided taking off when and under the circumstances he did.

37. Furumizo was not negligent in any manner in this respect, since his instructor was in charge of the plane, and at takeoff especially would be the one to exercise judgment in accepting clearance from the tower.

38. This negligence of Baker, since it antedated the actual takeoff of the Piper, was not the sole and last independent cause of the accident, but continued as a contributing cause from before the accident until it happened. Had Shima been an adequately trained pilot, and had he been adequately instructed and made fully aware of the dangers of large plane wake turbulence to small planes, the Court cannot believe that he would have taken off at the time and under the circum-

stances he did, the evidence indicating that he was a careful and prudent person, not one given to taking undue chances. . . .”

Again in finding 42, the Court alludes to:

“ . . . the negligence of the defendant Baker in not furnishing in Shima an adequately informed and trained pilot, . . . ”

And in paragraph 55 the Court stated:

“ . . . As this Court has held, the basic negligence on the part of defendant Baker was in failing to furnish to Furumizo, to whom it owed the highest degree of care, an adequately trained and informed instructor pilot having a full realization of the extent of the danger to planes of the size of the Piper, of turbulence in situations where such small plane would cross at an acute angle an intersecting runway on which the turbulence had been created, almost immediately after the turbulence was created.”

And again in paragraph 68 at page 54 of the decision, the Court says:

“ . . . While this does not excuse Baker, whose duty was of the highest to furnish to Furumizo an instructor pilot who so well knew of the imminent hazards of such a takeoff that he would have held back until the turbulence could be reasonably assumed to have safely subsided . . . ”

Having concluded that both Baker and the Government were negligent and liable, the Court turned to the issue of damages. On the loss of future wages, it used as a basis the figures and calculations submit-

ted by defendant Baker in its Exhibit B6, and reached an ultimate conclusion that the value as of June 20, 1965, of the net lost wages to that date, plus the future lost wages, would be \$126,216.46. In calculating this amount, the Court assumed a promotion to GS-9 in September of 1963, and a promotion to GS-11 ten years thereafter. The Court awarded \$50,000 to the widow for the loss of the care, comfort, society and companionship of her husband, \$30,000 to the daughter for the same loss with respect to her father, \$15,000 to the estate for the pain and suffering of the decedent in the accident, and \$363.93 as the cost of funeral expenses over and above a government allowance.

The trial ended on April 14, 1964 (Tr. 2071). The decision was rendered June 21, 1965. Thereafter, the plaintiff filed a motion to amend the complaint to add the theory of a failure to furnish an adequately informed and trained instructor pilot on the ground that this had been tried at the case and that the amendment should therefore be allowed (R. 624-627). Both of the defendants filed motions for a new trial (R. 628-633). No motion was made to amend the pre-trial order.

The Court, over objection, granted the motion to amend the complaint by order entered September 3, 1965 (R. 648-649). At the hearing on the motion for new trial, counsel vigorously pointed out the fact that the theory of the amended complaint on which the Court had ruled against defendant Baker, that is, that there was a failure to furnish an adequately

trained instructor, was not an issue in the pre-trial order, and had not in fact been alluded to in the oral ruling of the Court at the close of the trial on the issue of negligence, and that the defendant had had no opportunity to produce evidence on that subject (Tr. of October 1, hearing, page 6, et seq.). The Court overruled this as well as the suggestion that the matter be opened for the taking of further evidence (Tr. 19 and 20). On October 1, 1965, the Court entered its order denying the motions for new trial and the appeal follows.

QUESTIONS PRESENTED

1. Should the Court below, fourteen months after the trial, have held against appellant Baker upon a theory of negligence which was not presented in the pre-trial order, nor in fact tried at the trial?

2. Should the Court below have refused to allow the matter of evidence to be reopened for the purpose of putting in evidence of custom and practice among the flying schools with respect to the training of instructors with respect to wake turbulence?

3. Was there evidence upon which appellant Baker could be held negligent and the decedent absolved of contributory negligence?

4. Was the judgment below erroneous and excessive?

SPECIFICATIONS OF ERROR

1. The District Court erred in failing to dismiss the action as to Baker Aircraft Sales, Inc., for failure to show negligence on the part of said defendant-appellant or its employees.

2. The District Court erred in finding said defendant-appellant negligent in failing to provide adequate training for its employee instructor Shima, when such issue was not raised in the pleadings of the pre-trial order.

3. The District Court erred in permitting an amendment of the complaint after trial and decision to allege that the defendant-appellant was negligent in not providing proper training for its instructor employee Shima, and the Court further erred in refusing to permit said defendant-appellant a hearing thereon thus violating the due process clause of the United States Constitution.

4. The District Court erred in failing to follow the Hawaii Rule that there can be no negligence proved where a plane crashes and both pilots are killed, in the absence of some evidence as to who was at the controls and who made the crucial decision to take off in the instant case.

5. The District Court erred in holding defendant-appellant Baker liable.

6. The District Court erred in holding that there was no evidence that the decedent Furumizo was guilty of contributory negligence or assumed the risk of his injury.

7. The District Court erred in entering an excessive judgment on the evidence in the case.

8. The District Court erred in failing to follow the Hawaiian Rule that damages for loss of future earnings must be proved with certainty and cannot be speculative.

SUMMARY OF ARGUMENT

In this case, the aircraft which crashed began its takeoff roll at a point a thousand feet from the intersection of two runways when a very large jet had just taken off on the intersecting runway. The situation was such that there was imminent danger to the aircraft at the intersection from the wing-tip vortices of the department jet. There is no direct evidence as to who handled the communications with the tower, made the decision to take off, or actually flew the airplane. Evidence of custom and practice indicates that in such a situation the student pilot would handle the communications, make the decision, and actually fly the aircraft, although he would be monitored and followed through by the instructor pilot. Both the instructor and the student had knowledge of, and had been instructed in, as to the dangers of wake turbulence caused by wing-tip vortices of jet aircraft. In such a situation, where both of the pilots have died, what actually happened in the airplane cannot be proved, and under Hawaiian law, since neither negligence nor contributory negligence can be proved

in the circumstances, no verdict against the defendant-appellant can be rendered. Assuming that this rule can be disregarded, then it follows that the decedent, having been instructed in the matter of wake turbulence and being in all probability the one who made the decision to take off and the one who was handling the controls, was guilty of contributory negligence or assumed the risk of his injury.

The plaintiff's theory as set forth in the pre-trial order was that the defendant was negligent in that its instructor was negligent in taking off, or allowing the decedent to take off "in spite of his knowledge as well as a specific warning given to him of the hazard involved and in failing thereafter to maintain safe control of the aircraft under the circumstances". The Court below, however, expressly held defendant-appellant Baker liable upon a different theory, to wit that it had supplied an improperly trained instructor pilot.

There was no evidence to support this finding other than the evidence of the fact that the takeoff itself was made, since all of the evidence as to the training of the instructor pilot indicated that he had been instructed and did know of the dangers of wake turbulence. Moreover, such evidence was extremely scanty for the reason that it was not an issue in the case. Since the instructor pilot was also the person who instructed Furumizo, such evidence was relevant to show how much information he would have been able to pass on to the decedent student, and was therefore unobjectionable but the issue of the scope of his

instruction and the standards with respect thereto in the trade was not pleaded or tried. It was not argued. It was injected into the case by the Court *sua sponte*, fourteen months later.

The Court below permitted an amendment of the complaint after decision, even though the decision followed the trial by fourteen months. The Court below did not amend the pre-trial order, did not make the finding that there was manifest injustice in holding the plaintiff to the theory upon which the case had been tried, and refused to permit the reopening of the testimony to adduce evidence as to standards in the trade, which evidence was, of course, available and relevant. In so doing the Court below deprived the defendant-appellant of its day in court upon the very theory upon which it held it liable, and thus violated the Constitution of the United States.

Although the Hawaiian Rule is that there must be evidence with reasonable certainty of the loss of future earnings, the Court below in calculating the amount of lost wages gave the decedent two promotions, neither of which by the testimony were reasonably certain, and both of which depended upon assumptions of facts which could not be established at the time. Moreover, the Court below acted inconsistently in the application of its discounts and contrary to the evidence with respect to the deduction for the decedent's personal expenses.

Finally, the Court below awarded an excessive amount with respect to the pain and suffering of the decedent in the light of the evidence.

ARGUMENT**I. THE COURT BELOW ERRED IN HOLDING DEFENDANT
BAKER LIABLE (Specifications 1 through 6).**

This is a case in which the airplane in question contained two persons, the decedent Furumizo and the decedent instructor Shima. According to the evidence both had knowledge of and had been instructed with respect to the dangers of wake turbulence created by large aircraft. Moreover, since the decedent Furumizo was an employee of the FAA, knowledge of the matter on his part was conceded by the pre-trial order (R. 371-380). There is no evidence as to who communicated with the tower, who made the decision to take off and who actually flew the airplane, since both the occupants are dead. There is evidence that at the particular stage of training which the decedent Furumizo had reached, he would under normal custom and practice have been the person to handle the communications with the tower, make the decision to take off and fly the plane (Tr. 642, 643). Shima was of course a licensed instructor pilot employed by defendant-appellant Baker (Tr. 590, 592, 600). Furumizo had a student pilot's license (Exhibit P 13). Since both of the occupants of the plane died there is simply no evidence as to who did what and while Shima was an instructor pilot and Furumizo an unsoloed student pilot, the evidence does indicate that Furumizo had had instruction in wake turbulence (Tr. 568-569, 571-572, 580) and that he normally would have been the one who handled the communications, made the decision to take off, and flew the airplane (Tr. 640-643).

There is no case on this point which has been passed upon by the Supreme Court of Hawaii, however, in an unreported oral ruling in *Haddon v. Atkinson*, Civil 1023 in the Circuit Court of the Third Circuit of the State of Hawaii, a directed verdict on both the claim and counterclaim was granted by the Court of the Third Circuit in a situation where there were two persons in the airplane at the time of the crash and both were killed. The plane was in instrument weather conditions and only one of the two pilots had an instrument rating. Nevertheless, the Court directed a verdict against the claims by the estates of both pilots.

The cases from other jurisdictions on the subject are badly split and there can even be cases found in which courts have directed verdicts although the action was brought by a person who was a mere passenger, *Hall v. Payne*, 189 Va. 140, 52 S.E.2d 76 (1949).

See also:

In re Rivers Estate, 175 Kan. 809, 267 P.2d 506 (1958);

In re Hayden Estate, 174 Kan. 140, 254 P.2d 813 (1953).

Whatever may be the law in other jurisdictions, the law in Hawaii is established by the Third Circuit case in the cited and reported decision. The Federal courts are as much bound by the decisions of State lower courts where there is no decision by the Court of Appellate Jurisdiction in the State as they are by the decisions of the State Appellate Courts where there are such decisions, *Lembcke v. United States*,

181 F.2d 703 (2d Cir. 1950); *West v. American Telephone and Telegraph Company*, 311 U.S. 223 (1940).

The logic behind the rule that prohibits speculation as to who was actually flying the airplane and who made the crucial decision to take off is forcefully illustrated by the facts in this case. Here, both pilots had been instructed on wake turbulence. In all probability, although it cannot be known or shown, Shima having more experience also had more knowledge, but who it was that communicated with the tower, received the warning, made the decision to take off and flew the airplane we cannot know. We cannot know how Shima viewed the danger, we cannot know how Furumizo viewed the danger, all that can be done is speculate, and that is precisely what should not be done. Of course, it will be argued that Shima, being the licensed instructor is "responsible" for the aircraft. This scarcely supplies the missing facts. An analogy will demonstrate why. Let us suppose that an automobile equipped with dual controls and containing a licensed instructor driver and a licensed student driver approaching a red light suddenly accelerates into the path of a vehicle on an intersecting street and both instructor and student are killed. Who can say which of the two was the actor causing the fatal acceleration. In other words, in a situation such as this, is the aircraft training school the insurer of the student's safety? If so, when does the student's knowledge rise to the point where the rule no longer applies? Had Furumizo never been instructed on turbulence, then because Shima had, there would be

evidence on which a finding could be predicated. Here, both had been instructed but the amount of instruction Furumizo had received and how much he had absorbed cannot be known because Shima and he are both dead. Evidently he was nearing the time for solo when he presumably would be sufficiently instructed as to deal with such situations with no instructor aboard. How then can the evidence in the record convict Shima and acquit Furumizo of negligence or assumption of risk.

Probably it was in order to avoid this dilemma that the Court below held that appellant Baker was negligent in furnishing an improperly trained instructor in Shima. Yet the only evidence is that Shima was a competent pilot who was properly instructed as to wake turbulence (Tr. 590, 592, 600, 626).

There is no evidence other than the fact that the airplane took off which would indicate that he would not know of the dangers of wake turbulence, but there is more to the issue than that. In this case a pre-trial order was entered. Plaintiff's theory was set forth. That theory was not that Shima was improperly trained, but that Shima, although knowing of the dangers, negligently took off. The evidence with respect to Shima's training *was of course relevant on the subject of plaintiff's assertion that he knew the danger* and it was also relevant since he was Furumizo's instructor on the subject of how much instruction Furumizo would or should have received on the subject of wake turbulence. There was no assertion at any point during the trial that the negli-

gence theory being pursued by the plaintiff was that appellant Baker had negligently furnished an improperly trained instructor. The arguments made at the close of the trial on liability which are reported in the transcript on pages 1457 through 1638 do not disclose that this was the theory being pursued by the plaintiff, on the contrary, as plaintiff's counsel stated:

“With respect to the facts of judgment—pertaining to the judgment and knowledge of Mr. Shima, *he was aware of the potential hazard of turbulent wake* of large aircraft to smaller aircraft. By a stipulation, this was a matter of common knowledge in the flying industry at the time.” (Tr. 1464, 1465) (Italics supplied)

Again:

“Now, as to the knowledge of Shima, Mr. Jones stated that if you know there is turbulence you just don't take off. And this, as I said earlier, was communicated directly to him in the clearance. So, regardless of his degree of knowledge, if any, he was responsible to know, as an instructor, and in view of the agreed fact that it was common knowledge in the industry, particularly.” (Tr. 1466)

And again, he said further that to the best of his knowledge, Shima was aware of the wake turbulence hazard.

“Both Mr. Kay and Mr. Carter indicated that all current publications, such as plaintiff's Exhibit 15, the Aviation Safety Release 399, were available to him, and he should have been aware of them, whether he was or not; that he was re-

sponsible to read them and to be aware of their contents." (Tr. 1466-1467)

"So the conclusion as to Instructor Shima is that he either knew or should have known of the hazard which caused the accident, and therefore was negligent in doing nothing about it." (Tr. 1467)

Counsel for the appellant Baker stated during oral argument:

"Mr. Crumpacker's essential claim, as I understand it correctly, is that the alleged negligence of Baker Aircraft consisted in a decision which he said that Mr. Shima made to proceed when he received that clearance." (Tr. 1509)

And again:

"His claim is that the act was the negligent taking off of the aircraft, which he says is negligent; therefore, you must imply that the pilot did it. But I say this is exactly like all of the other cases. There are two people in that aircraft; and by the great weight of authority, there is no evidence to show who made the determination to go, and who actually controlled the plane, except for the evidence which we have as to custom, to which I will come shortly." (Tr. 1512)

On rebuttal, counsel for the appellee argued:

"The negligence as far as Baker Aircraft Sales is concerned, aside from the control tower operator, was that of Shima in taking off into the turbulent wake of this DC-8 in spite of the warning which was given, and which the evidence clearly establishes caused the accident—that is, the wake of the DC-8." (Tr. 1627)

Nor was anything said with respect to the theory of inadequate training of Shima in the oral decision of the Court at the close of the case on liability (Tr. 1639-1640).

Thus the theory that appellant Baker was negligent in failing to provide a properly trained instructor was injected into the case for the first time in the decision of the Court, some fourteen months after the trial. Nevertheless, having so injected the theory, the Court below, over objection, allowed an amendment to the complaint (without amending the pre-trial order) and denied a motion for a new trial, and refused to hear any further evidence. Rule 16 of the *Federal Rules of Civil Procedure* provides:

“The Court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered, controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.”

Rule 16, *Federal Rules of Civil Procedure*.

Here, the binding nature of the pre-trial order was entirely disregarded and a new theory injected into the case and made the basis for the decision against the appellant Baker some fourteen months after trial and with no finding that it was necessary to prevent manifest injustice. Obviously the provisions of Rule 16 were simply thrust aside, and appellant Baker was

held liable on a new theory despite the evidence in the record of Shima's training, simply because the Court concluded without giving appellant Baker a chance to be heard and to introduce evidence thereon, including evidence of trade standards, that Shima must have been improperly trained because the accident happened. In *Clark v. United States*, 13 F.R.D. 342 (D.C. Oregon 1952) it is stated:

“In the second phase of the order, the parties by succinct statement set up their theories of recovery and of defense. This is an extremely important function of the pre-trial order. The doctrine that there has to be a theory of the pleadings has been much criticized in the past. But, obviously enough, no lawyer can go into the trial of the case unless he has some theory of substantive law upon which he bases his right to recover. If it is improper to deduce this from the language of the pleading, it certainly is not improper for the party to set it out and be bound by his theories of recovery. If it is impossible for him to state a theory of recovery, then it might well be concluded that no such theory exists. It is unquestionably improper for the matter to lie at large and permit some court, whether trial or appellate, to pick the theory upon which the facts of the case should be decided, perhaps to the injustice of a litigant. Nor should either trial or appellate court assume that they are omniscient as to the causes of action which are set out by a complaint and that they may disregard the counsel's own theories of recovery.

“When a plaintiff has by his counsel advised the Court and defendant of the theories upon which he relies and has given account of these,

then the Court should not adopt some other theory of recovery, even if it should be believed that such a theory was more applicable . . .” (page 345)

See also:

Phoenix Assurance Company of New York v. Latta, 373 P.2d 146 (Wyo. 1962);

Montgomery Ward & Co. v. Northern Pacific Terminal Company, 17 F.R.D. 52 (D.C. Oregon 1954) page 55;

Blanken v. Bechtel Properties, Inc., 194 F. Supp. 638 (D.C. D.C. 1961);

United States v. An Article of Drug, Etc., Acnotabs, 207 F.Supp. 758 (1962) at page 768.

As is stated in 3 Moore’s Federal Practice (Second Edition), paragraph 16.20:

“As stated in the preceding section, the pre-trial order is ordinarily binding on the parties; if it were not, the pre-trial conference would lose much of its effectiveness. The court may, however, modify the order ‘to prevent manifest injustice’ . . .”

We submit, that based on the pre-trial order, the theory upon which the Court below relied was not available to it or to the plaintiff and that judgment therefore should have been entered for the defendant Baker. But even if after trial a new theory was to be inserted into the case, nevertheless, appellant Baker should have had a chance to introduce evidence thereon, compare *Bowles v. Wheeler*, 152 F.2d 34 (9th Cir. 1945).

Here, the very instructor from whom Mr. Shima had gotten his training was on the stand during the trial (Tr. 592) yet because the issue of whether or not Shima was adequately trained was not raised in the pre-trial order or in the trial of the case by anyone, including the Court, the examination of that witness on the subject of Mr. Shima's training was superficial. Moreover, since there were other flying schools in Hawaii (see Tr. 1433 et seq.), there obviously would have been available evidence as to custom and practice in the trade, and such evidence would have been relevant on the subject of whether or not Baker was at fault in failing more adequately to train Shima, see Restatement of Torts 2d, Section 295-A and the Reporter's comments thereon. See also 38 Am. Jur., Negligence, §317 and compare the annotation "Admissibility, upon issue of negligence, of evidence of custom or practice of others" appearing in 137 A.L.R. page 611.

Appellant Baker had no notice that his issue was being tried and had no chance to defend in any manner. At the time of a motion for new trial as the transcript on that hearing shows, it made a strong and vigorous plea for an opportunity to present further evidence on this subject, which was denied by the Court below. Appellant Baker was thereby deprived of its day in court and of due process of law. It follows therefore, that even if the judgment cannot be reversed for the entry of judgment in favor of defendant Baker it should be reversed and a new trial on the issue of the negligence of defendant Baker on the theory found by the Court below ordered.

**II. THE COURT ERRED IN HOLDING APPELLANT BAKER
LIABLE BECAUSE, UNDER THE EVIDENCE, THE DECEDENT
FURUMIZO WAS GUILTY OF CONTRIBUTORY NEGLIGENCE**

(Specification of Error No. 6).

The evidence is clear that Furumizo had been instructed on the danger of wake turbulence (Tr. 568, 569, 571, 572, 580). The evidence is also clear that by custom and practice he would have been the person to have communicated with the tower, made the decision to take off and flown the plane (Tr. 567-8, 571-2, 580, 597-8, 632). If we are to ignore the Hawaiian precedent and to follow the Minnesota case of *Lange v. Nelson-Ryan Flight Service Inc.*, 259 Minn. 460, 108 N.W.2d 428, which held that the student pilot was not guilty of contributory negligence because no evidence thereof was introduced, then even so, custom may be used for the purpose of showing who was in the control of the plane and who made the decisions which led to the crash, *Whittemore v. Lockheed Aircraft Corporation*, 65 Cal.App.2d 737, 151 P.2d 670 (1944); *Underwriters v. Cherokee Laboratories, Inc.*, 288 F.2d 95 (10th Cir. 1951). With the evidence of custom and with the evidence of training, it follows that the decedent Furumizo was either guilty of contributory negligence or assumed the risk of his injury even under the rule in the *Lange* case, *supra*, because as is said in that case:

“It is elementary that the defence of assumption of risk is properly submitted only *where there is evidence which would permit a finding that one so charged had knowledge of the particular risks; and comprehending and appreciating such risk, voluntarily took his chances of harm*

from that particular risk. Technical progress in the art of flying has reached the point where an airplane cannot be regarded as a dangerous instrumentality, per se. Merely undertaking a flight in a modern aircraft, free from mechanical defects, where no dangerous condition known or reasonably to be apprehended or shown, does not provide a sufficient evidentiary basis upon which to submit assumption of risk." (*Italics supplied*)

The instant case on the evidence is therefore clearly distinguishable from the *Lange* case since there was evidence of training with respect to wake turbulence and since there was evidence as to control of the aircraft based upon custom. Accordingly, even if the Court were unwilling to follow the Hawaiian precedent cited, it should have found in favor of defendant Baker, because the decedent Furumizo was guilty of contributory negligence or assumed the risk of his injury.

III. THE COURT BELOW AWARDED AN ERRONEOUS AND EXCESSIVE AMOUNT OF DAMAGES (Specification of Error No. 7).

As has been pointed out, the Court below promoted Mr. Furumizo posthumously from a GS-7 to a GS-9 in September of 1963, and from a GS-9 to a GS-11 in September of 1973. Under Hawaiian law the test for the measurement of future earnings is reasonable certainty, *Condron v. Harl*, 46 Hawaii 66 (1962) at 75. While the witness Olsen testified over objection that in his opinion the decedent Furumizo would have been promoted to GS-9 by September of 1963, based

upon the performance of others who were employed at the same time he was (Tr. 1688 and 1689), he had previously explained that such an opinion was based upon the assumption that Mr. Furumizo would have gone to the Oklahoma City Academy and passed the course there (Tr. 1681) and that his conclusion thereon might or might not be highly questionable. He had further testified that he could not say whether or not Furumizo would pass the course if he was sent to take it (Tr. 1672, 1674). This makes plain the fact that Furumizo was not reasonably certain of promotion to GS-9.

When we come to GS-11 the record is even stronger. Olsen, who was in charge of installation, the branch in which Furumizo worked, stated that there had been no promotions from GS-9 to GS-11 between the date of Furumizo's death and the date of the trial (Tr. 1691). He further testified that in order for him to give an opinion as to whether Furumizo would ever be promoted from GS-9 to GS-11 he would have to make certain assumptions of fact which are listed in the transcript at page 1694. As counsel for the appellee stated:

“I am not asking him for the opinion because it is apparent there are too many assumptions involved, Your Honor.” (Tr. 1695)

The witness Wong who worked in maintenance did give an opinion that Furumizo would eventually be promoted from GS-9 to GS-11 (Tr. 1761, 1762, and 1763). This, however, was based upon, among other things, a transfer from installation into maintenance

(Tr. 1776). We therefore are obviously dealing with a situation in which such a promotion is speculative. Even Counsel for the appellee admitted that in his brief on damages (R. 402-426) where he says at page 2:

“Unfortunately, because of the uncertainties in forecasting the existence of vacancies, etc., Plaintiffs are not in a position to make any strong contention that the damages here should be based partially upon the GS-11 pay scale.”

When the Court issued its decision fourteen months later it was not hampered by appellee's own admission that they were not in a position to make a strong argument for a promotion to GS-11. The Court promoted Mr. Furumizo to GS-11 in the face of the evidence and in defiance of Hawaiian law. It is appellant Baker's position that even the promotion to GS-9 was speculative and should not have been, under Hawaiian law, included in the damages, but certainly there can be no excuse for the inclusion of the promotion to GS-11.

A second point with respect to the damages for loss of future earnings is the fact that the Court below multiplied the earnings by a factor of 1.15865 to make up for the discount from the period from the date of death, June 20, 1960, to the day before the decision, June 20, 1965. However, the Court did not also multiply the deductions for pension contributions and income taxes on the same basis even though they were calculated and discounted on the same basis originally.

A final point in connection with the calculation of the worth of future earnings appears in the fact that the Court below calculated the decedent's personal expenses at 35% of salary after the deduction of pension plan payments and income taxes although, according to the testimony of the witness on the subject, Mrs. Furumizo, her calculation was based on 35% of the gross (Tr. 1936). It is to be noted that the Court gave the full earnings for the four years from June 20, 1961, to June 20, 1965, to the appellee but did not use her basis (35%) for deducting the decedent's personal expenses even in those years, let alone in any future years. This, we submit, was contrary to and unsupported by the evidence.

Finally, there is the matter of the \$15,000 awarded for pain and suffering. As pointed out, the evidence indicates that the plane burst into flames practically instantaneously, and the pain and suffering, whatever it was, could not have had a duration of more than a few seconds. In the Court below the appellee had cited the cases of *Kimmel v. Solow*, 199 N.Y.S.2d 375 (Super. Ct. 1960) where an award of \$5,000 was made, although there was nothing revealed about the cause of death or the duration of the suffering. In *Meehan v. Central Railroad Company of New Jersey*, 181 F.Supp. 594 (S.D. 1960), a train went into a river from an open drawbridge and the decedent drowned. A verdict of \$10,000 for his pain and suffering was allowed to stand. In *Hickman v. Taylor*, 75 F.Supp. 528 (E.D. Pa. 1947), a seaman who was apparently asleep when the tug he was on sank, was awarded

\$1,000 for pain and suffering. Comparison of cases is of course unsatisfactory as a basis for judging whether or not an award is too large or too small, but it is the only yardstick available. Here we know that death was practically instantaneous. Certainly it is plain that a death by drowning has a longer period of suffering than was encountered here. We submit that the award of \$15,000 for the intense suffering of a few seconds duration in the light of all the other damages and in the light of the comparable cases, was excessive.

CONCLUSION

For the reasons stated above, the judgment below should be reversed or in the alternative, a new trial ordered, or alternatively the judgment should be remanded for further hearings and for amendment of the amount of damages.

Dated, Honolulu, Hawaii,
June 8, 1966.

Respectfully submitted,

FRANK D. PADGETT,

Attorney for Defendant-Appellant.

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Of Counsel.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK D. PADGETT.

(Appendix A Follows)

Appendix.



Appendix A

EXHIBITS

Transcript pages are used rather than record pages as the latter
is not available to counsel)

Exhibit No.	Identified	Received
P-1	46	176
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P-2-B	52	—
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P-2-D	52	—
P-3	108	108
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P-5	172	172
P-6	176	177
P-7	178	808; 813
P-8	178	—
P-9-A	181	—
P-9-B	181	—
P-10	182	182
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P-12	183	—
P-13	184	184
P-14	186	186
P-15	187	187
P-16-A	By stip. 363	1197
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P-16-C	By stip. 363	1197
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P-16-E	By stip. 363	1197
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P-17-C	204	1197
P-18	207	207
P-19	207	1199
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P-20-B	218	1219
P-21	220	As G-12
P-22	220	As G-13
P-23	220	1009
P-24	220	1017
P-25	220	As G-14
P-26	220	1017
P-27	220	As G-15
P-28-A	479	778
P-28-B	479	778
P-28-C	479	778
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Exhibit No.	Identified	Received
P-30	615	615
P-31	790	792
P-32	790	792
P-33	977	1200
P-34	1001	As B-3
P-35	1001	As B-2
P-36	Was G-4	1009
P-37	(1202	1217
P-37-B	(1202	1217
P-37-B	(1202	1217
P-38	1206	1217
P-39	1209	1218
P-40-A	1654	—
P-40-B	1654	—
P-40-C	1654	—
P-41	1715	1721
P-42	1715	1978
P-43	1715	—
P-44	1819	1819
P-45	1805	1805
P-46	1818	1818
P-47	1831	1839
P-48	1834	—
P-49	1873	1964
P-50	1873	1976
P-51	1873	1973
P-52	1898	1974
P-53	1921	—
P-54	1921	—
G-1	133	133
G-2	1253	1253
G-3	1253	1253
G-4	—	As P-36
G-5	—	1079
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G-7	501	—
G-8	577	583
G-9	577	—
G-10	590	591
G-11	885	1421
G-12	1027 (Was P-21)	1027
G-13	1027 (Was P-22)	1027
G-14	1027 (Was P-25)	1027
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G-16-A	1455	1455
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B-4	1954	—
B-5	1984	1984
B-6	1987	2004
B-7	2022	2025

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA AND BAKER
AIRCRAFT SALES, INC.,

Appellants and Cross-Appellees,

v.

BETTY K. FURUMIZO, ET AL.,

Appellees and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR THE UNITED STATES OF AMERICA

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FILED

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20641

UNITED STATES OF AMERICA AND BAKER
AIRCRAFT SALES, INC.,

Appellants and Cross-Appellees,

v.

BETTY K. FURUMIZO, ET AL.,

Appellees and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR THE UNITED STATES OF AMERICA

JURISDICTIONAL STATEMENT

This action was brought by Betty K. Furumizo, on her own
alf and on behalf of Cynthia H. Furumizo, a minor, and as
administratrix of the estate of Robert T. Furumizo, against
United States of America, under the Federal Tort Claims Act,
U.S.C. 1346(b), 2671, et seq. and against Baker Aircraft Sales,
., under 28 U.S.C. 1332, seeking to recover damages for the
th of her husband in the amount of \$350,000. The district court,
er trial on the merits, entered judgment for the plaintiffs in
amount of \$221,580.39. Defendants' timely motions for a new

trial were denied on October 1, 1965. On November 26, 1965, the United States filed a notice of appeal and three days later Baker Aircraft Sales, Inc. filed its notice of appeal. That same day November 29, 1965, plaintiffs filed a notice of cross-appeal. Jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

On June 19, 1961, plaintiffs' decedent, a student pilot, a Charles I. Shima, a flying instructor employed by defendant Baker Aircraft Sales, Inc. (hereinafter Baker), took off from Honolulu International Airport in a single-engine Piper Super Cub owned by Baker (Tr. 81, 84, R. 376).^{1/} The purpose of the flight was to provide decedent with instructions concerning touch-and-go landings (Tr. 377). In this maneuver, the pilot "performs an approach and a landing [on a runway] and then, without stopping his landing roll, proceeds directly into [a] takeoff" (Tr. 1264).

During the ensuing half-hour, the Piper made a number of touch-and-go landings at the Honolulu field on runways 4 right and 4 left (Tr. 102, 978, R. 377). These runways are each 7000 feet in length and extend in a southwest-northeast direction, parallel

^{1/} "Tr." references are to the transcript of proceedings filed in this Court; "R." references are to the reproduced transcript of record, exclusive of the trial transcript; and "PX" references are to plaintiff's exhibits while "GX" references are to the Government's exhibits.

each other (PX-1).^{2/} Each runway intersects the main east-west runway (number 8) at a 45 degree angle (PX-1). Runway 8 is 13,104 feet in length (PX-1).

While the Piper was in the process of making a touch-and-landing, it received the following transmission from the Honolulu control tower: PIPER NINE NINE ZULU MAKE THIS A FULL STOP HOLD SHORT OF EIGHT IF POSSIBLE (PX-5 transmission 9, Tr. 964).^{3/} The Piper acknowledged the communication and stopped on runway 4 left, near the midfield taxi-strip, approximately 900 feet before the intersection of runways 4 left and 8 (Tr. 229, PX-1). The local control operator in the tower^{4/} then cleared an Air Force T-33 trainer for take-off from runway 8 (Tr. 95 trans. #25, Tr. 94, 966). After the T-33 cleared the runway the local control operator told a Japan Air Lines DC-8 to taxi in position and hold at the end of runway 8 (Tr. 966). Baker's

We were advised by the Clerk of the Court in a letter dated February 16, 1966, that the exhibits admitted into evidence by the court would not be reproduced but would be considered in their original form.

The Piper's identification number was N-3299Z (R. 377). The tower communicated with the aircraft by calling "NINE NINE ZULU" which are the last three numbers and letters in the Piper's identification number (PX-5).

In addition to the local control operator, Mr. Humphreys, there were three other controllers on duty in the tower at the time of the accident: the flight data operator, Mr. Krogh; the ground control operator, Mr. Cappellas; and the tower supervisor, Mr. Macchia (Tr. 923-924).

aircraft then received the following instruction from the tower:
PIPER NINE NINE ZULU PULL AHEAD SLIGHTLY [TO] ALLOW DC THREE TO
PASS BEHIND YOU (PX-5, trans. #28, Tr. 967). Thereafter, the
DC-8 was advised by the tower that the wind was from the north-
northeast at 6 knots and that it was cleared for take-off (PX-5
trans. #30, Tr. 968-969). At that time, there were scattered
clouds at 3000 feet and visibility was 15 miles (R. 377).

After making eight more transmissions to other aircraft
in the area, the local controller cleared a Cessna 150, which was
located on runway 4 left just north of the intersection of that
runway and runway 8, for takeoff from 4 left (Tr. 973-974).
Then an Air Force C-47, which was holding at the end of runway
4 right, received the following transmission from the tower:
AIR FORCE SIX THREE THREE EIGHT CAUTION TURBULENCE DEPARTING
DC EIGHT CLEARED FOR TAKE-OFF (PX-5 trans. #43, Tr. 317, 974).
After issuing the warning and take-off clearance to the C-47,
the controller stated: "PIPER NINE NINE ZULU CAUTION TURBULENCE
DEPARTING DC-8 CLEARED FOR TAKE-OFF" (PX-5 trans. # 44, Tr. 974).

The Piper aircraft, notwithstanding the turbulence warning
it has just received, began its take-off roll immediately (Tr. 234
1077). At that moment, the DC-8 was approximately two miles beyond
the intersection of runways 4 left and 8 (Tr. 1069, 1077, PX-1).

5/ While the transmission might be construed as a warning alone
The turbulence created by the DC-8 which had been cleared for take
off, it was in fact a warning coupled with a clearance to the Piper

e Piper completed its take-off roll and initial climbout normally, but then began to climb "excessively nose high". (Tr.). At an altitude of about 50 to 75 feet, the Piper "appeared stall," its right wing fell off to the right and the plane contacted the ground just short of the intersection of runways left and 8 (Tr. 95, 101). It was 6:56 p.m. local time, twenty minutes before sunset (R. 377).

The C-47 which had been cleared for take-off prior to the Piper, delayed its take-off some twenty to forty seconds, because the pilot wanted to wait for the turbulence generated by the DC-8 to subside (Tr. 317-318). It then began its take-off roll along runway 4 right. As the C-47 passed the intersection of runways right and 8, at an altitude of approximately 150 feet, the pilots saw the Piper on the ground burning (Tr. 321). The C-47 experienced moderate turbulence and continued on its flight (Tr. 321).

Plaintiffs instituted this action against the United States and Baker Aircraft Sales, Inc. claiming damages in the amount of \$50,000 (R. 13-15). Plaintiffs' theory of recovery was that the Piper took-off "directly into the 'jet wash' of a DC-8, which had previously taken off . . . thereby causing the [light] aircraft to crash" (R. 373). Plaintiffs alleged that the United States, through its employees, was negligent in failing to provide adequate safeguards for the protection of decedent from the hazards

f wake turbulence and in clearing the Piper for take-off directly into the wake turbulence of the DC-8 (R. 373). They also alleged that Baker Aircraft, through its employees Shima, was negligent in taking-off or allowing decedent to take-off directly into the jet wash of the DC-8 in spite of Shima's knowledge, as well as the warning, of the hazard involved. The Government denied plaintiffs' allegations and asserted that any damages to the plaintiffs was caused by the negligence of the instructor pilot employed by Baker (R. 27-28, 465).^{6/}

After a lengthy trial, the district court (per Tavares, J.) entered judgment for the plaintiffs (R. 614). The court found, inter alia, that "the cause of the accident was turbulence caused by the departing DC-8" (R. 557); that defendant "Baker was negligent in not having furnished an instructor who was so fully aware of such dangers that he would have avoided taking off when and under the circumstances he did" (R. 559); and that the negligence of Baker was "a contributing cause" of the accident (R. 560). The court also found that the Government controllers "had a duty to exercise judgment to attempt to avoid danger where such danger was or should have been obviously imminent under the circumstances".

Baker denied that any of its employees were negligent and contended that the damages were proximately caused by the negligence of the decedent (R. 375). In addition, Baker asserted a cross-claim against the Government contending that if it were held liable to the plaintiffs, it should have judgment against the United States for such amount or for contribution (R. 375).

. 561); and that here, they should have "attempted to hold the clearance a sufficient time to minimize the acute danger" to the Piper (R. 562). The court concluded that each defendant "should pay one half" of the \$221,580.39 judgment (R. 562).^{7/} Thereafter, both defendants filed timely motions for new trial which were denied by the district court on October 1, 1965 (R. 694).

SPECIFICATIONS OF ERROR

1. The district court erred in failing to find that the negligence of Baker's flying instructor was the sole proximate cause of the accident involved herein.
2. The district court erred in finding the air traffic controllers negligent in the performance of their duties.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Tort Claims Act and the Civil Air Regulations are set forth in the appendix to this brief.

SUMMARY OF ARGUMENT

The record before this Court makes plain that the negligence of Baker's flying instructor superseded any alleged negligence of the part of the controllers and, additionally, that the instructor's negligence was the sole proximate cause of Mr. Furumizo's death.

The district court's opinion is reported at 245 F. Supp. 981.

Thus, the judgment entered against the United States must be reversed. Moreover, wholly independent of any question as to the correctness of the district court's causation finding, the judgment must be reversed for the additional reason that the court erred in finding that the air traffic controllers were in any way negligent in the performance of their duties on the afternoon of June 19, 1961. The evidence in this case clearly establishes that the tower personnel fully and properly performed all the duties and responsibilities required of them at the time of the accident.

ARGUMENT

I. SCOPE OF REVIEW AND APPLICABLE PRINCIPLES OF LAW

A. Scope of review

This Court is, of course, justified in holding a trial court's finding of fact "clearly erroneous" under Rule 52(a) if, after reviewing all the evidence, it is left with a firm impression that error has been committed. Guzman v Pichirilo, 369 U.S. 98; United States v. United States Gypsum, supra; Dresser Industries v. Smith-Blair, Inc., 322 F. 2d 878, 881 (C.A. 9); Scott Publishing Co. v. Columbia Basin Publishers, Inc., 293 F. 2d 15, 20 (C.A. 9), certiorari denied, 368 U.S. 940.

And, quite apart from evidentiary matters, where findings of fact are induced by erroneous interpretations of the law, they are not binding on the reviewing court. Baumgartner v. United States

2 U.S. 665, 670-671; Island Service Co. v. Perez, 309 F. 2d 9, 804 (C.A. 9); United States v. Miller, 303 F. 2d 703, 9-710 (C.A. 9), certiorari denied, 371 U.S. 955; Davis v. Arkhill-Goodloe Co., 302 F. 2d 489, 491 (C.A. 5). Such findings cannot stand. Ibid.

B. General rules of tort law applicable to this case

The findings and conclusions of the district court must also be considered in light of the general principles of negligence law applicable to aviation. In the absence of special statutes the ordinary rules of tort law apply to aircraft accidents. United States v. Miller, 303 F. 2d 703 (C.A. 9), certiorari denied, 371 U.S. 955; see also Franklin v. United States, 342 F. 2d 581, 584 (C.A. 7), certiorari denied, 382 U.S. 844; United States v. Multetus, 277 F. 2d 322 (C.A. 5), certiorari denied, 364 U.S. 828. Since the accident in this case occurred in Hawaii, the substantive standard of negligence derives from the law of that State. 28 U.S.C. 16(b); Richards v. United States, 369 U.S. 1; Franklin v. United States, supra.

Under Hawaii law, as in all common-law jurisdictions, it is axiomatic that the essential elements of a cause of action in negligence are (a) the existence of a duty on the part of the defendant, (b) the negligent failure to perform that duty and (c) injury resulting directly from that failure. Medeiros v. Honomu Sugar Co., 21 Haw. 155, 159; see Carreira v. Territory of Hawaii,

0 Haw. 513, 518-519. Thus, before a defendant can be found to be negligent, it must first be determined that he owed some duty to the plaintiff. See Young v. Price, 47 Haw. 309, 314; Ciacchi v. Polley, 33 Haw. 247, 252-253. For, where there is no duty owed by the defendant, there can be no negligence on his part. Cf. Wax v. City and County of Honolulu, 34 Haw. 256, 257.

In addition, liability will not attach unless the plaintiff has shown not only that the defendant was negligent but that there was a causal connection between the negligent act and the damages which the plaintiff sustained. Carreira v. Territory of Hawaii, 40 Haw. 513, 518, 519; Ward v. Inter-Island Steam Navigation Co., 22 Haw. 66, 70-71. Where "there are two negligent acts by separate parties which seemingly lead to the injury, each may be held to be a contributing proximate cause . . . and liability may attach to both parties . . . [but,] if the negligent act of one is later in point of time, such act may be sufficient to interrupt the causal chain established by the other, in which case only the later act is the proximate cause and the party committing it is solely liable." Mitchell v. Branch and Hardy, 45 Haw. 128, 132; see also Wax v. City and County of Honolulu, supra.

It is against this background that the district court's negligence and causation findings must be considered. We show now (in Point II, infra) that liability should not have attached against the United States since Mr. Furumizo's death was attributable solely to the negligence of flying instructor Shima. And, in Point I, infra, we show that there is a separate, independent reason for reversing the judgment against the United States in view of the fact that the district court clearly erred in finding the air traffic controllers negligent in the performance of their duties.

II. THE DISTRICT COURT ERRED IN HOLDING THE UNITED STATES LIABLE FOR MR. FURUMIZO'S DEATH, SINCE THE NEGLIGENCE OF BAKER'S FLYING INSTRUCTOR SUPERSEDED ANY ALLEGED NEGLIGENCE ON THE PART OF THE CONTROLLERS AND THE INSTRUCTOR'S NEGLIGENCE WAS THE SOLE, PROXIMATE CAUSE OF THE ACCIDENT

In the instant case, the district court found that the negligence of the air traffic controllers was "a contributing cause of the accident along with the negligence of defendant Shima in not furnishing in Shima an adequately informed and trained pilot, and . . . that each is equally liable" (R. 562). We submit that, even if the Honolulu controllers were negligent in not withholding the take-off clearance as the district court concluded, the court below still erred in holding the United States liable for Mr. Furumizo's death. For, as we pointed out above (p.10 supra), under Hawaii law liability cannot attach against two defendants whose negligent acts seemingly lead to the plaintiff's injury, when the one negligent act is later in point of time and interrupts

the causal chain established by the other. In that situation, only the later act is the proximate cause of the injury and the party committing it is solely liable. Mitchell v. Branch and Hardy, 15 Haw. 128. The record in this case reveals that the instructor pilot was clearly negligent in taking-off into the wake of the departing DC-8, despite the warning from the tower, and that this negligence superseded any alleged negligence on the controllers' part and interrupted any chain of causation established by such negligence. The accident was attributable solely to flying instructor Shima's negligent act.

A. The duties and responsibilities of Baker's instructor pilot

Essential to a determination of pilot negligence is, of course, the existence of a duty on the part of Baker's flying instructor, Mr. Charles Shima. It should be pointed out, in this regard, that the duties and responsibilities of pilots of civilian aircraft, as of June 19, 1961, are set forth in the Civil Air Regulations, 14 C.F.R. 1, et seq. (1961 Rev.). These regulations, which are promulgated by the Administrator of the Federal Aviation Agency and have the force of law (United States v. Schultetus, 277 F. 2d 322, 327 (C.A. 5), certiorari denied, 364 U.S. 828) are divided into many parts, each governing a specific phase of civil aviation. One such part, the air traffic rules (14 C.F.R. 60 (1961 Rev.)),^{8/} regulates air traffic as the title

^{8/} Unless otherwise specified, all "14 C.F.R. 60" references may be found in the 1961 Revision of 14 C.F.R.

plies. The rules provide, inter alia: (1) that the pilot in command of an aircraft -- who, in the case of the Piper, was flying instructor Shima (Tr. 497, 601, 603, 657) -- is "directly responsible for its operation and [he] shall have the final authority as to the operation of the aircraft" (14 C.F.R. 60.2); (2) that the pilot in command must, prior to the commencement of flight, familiarize himself with "all available information" which is appropriate to his flight (14 C.F.R. 60.11); (3) that a pilot may operate his aircraft in a "careless or reckless manner" and he must maintain vigilance to observe and avoid other aircraft (14 C.F.R. 60.12); (4) that, when on or in the vicinity of an airport where air traffic control is in operation, an aircraft must maintain contact with the control tower either visually or by radio (14 C.F.R. 60.18(b)) and (5) that under VFR weather conditions, it is the direct responsibility of the pilot to avoid other aircraft even when flying with a traffic clearance (14 C.F.R. 60.21-1, note).

The courts, in construing these Regulations, have held that under VFR weather conditions the ultimate responsibility for the safe operation of an aircraft rests with the pilot of that craft. United States v. Miller, 303 F. 2d 703, 710 (C.A. 9), certiorari denied, 371 U.S. 955; United States v. Schultetus, 277 F. 2d 322 (C.A. 5), certiorari denied, 364 U.S. 828. The pilot has the duty of seeing and avoiding other air traffic. Franklin v. United States, 342 F. 2d 581 (C.A. 7), certiorari denied, 382 U.S. 844;

enninger v. United States, 234 F. Supp. 499 (D. Del.), affirmed 52 F. 2d 523 (C.A. 3). Indeed, according to the court in enninger, the airplane pilot has a duty to observe and avoid the turbulence generated by other larger aircraft and his failure to do so may constitute negligence on his part. 234 F. Supp. at 517.

The evidence establishes that at the time of the accident IFR weather conditions existed at the Honolulu airport (R. 377) and the Piper had been engaged in a VFR flight (Tr. 102, 978).^{9/} Flying instructor Shima was thus dutybound to see and avoid other aircraft; he had the primary responsibility, as the pilot in command, for the safe operation of his aircraft. All the witnesses who testified on this matter acknowledged the fact that the Piper's pilot had these obligations (Tr. 601-603, 657, 1012, 1149, 1236, 1369). The question becomes, therefore, whether flying instructor Shima performed said duties with the care and diligence which a reasonably prudent instructor pilot would have exercised under similar circumstances.

B. Flying instructor Shima was negligent in failing to heed the warning given and in taking-off immediately

The uncontroverted evidence reveals that immediately after receiving the turbulence warning and the take-off clearance, the Piper aircraft began its take-off roll, climbed to an altitude of about 50 to 75 feet, rolled to its right and crashed at a point ju

^{9/} To be "engaged in a VFR flight" means that the aircraft's pilot is flying his plane visually.

port of the intersection of runways 4 left and 8 (Tr. 95, 101, PX-5, trans. 44). The Air Force C-47, which had been cleared for take-off prior to the Piper, waited an additional 20 to 40 seconds before beginning its take-off roll from runway 4 right (Tr. 317-318). The C-47 made a normal take-off and, as it passed the intersection of runways 4 right and 8, at an altitude of 100 feet, the aircraft encountered moderate turbulence but continued its climb-out (Tr. 321). The co-pilot of the C-47, Colonel McCann, testified that the C-47's pilot (Colonel Garland) delayed taking off in order "to allow the turbulence to subside" (Tr. 317). Colonel McCann stated that the "decision to delay for a short time" was made by the C-47's pilot after receiving the following warning and clearance from the tower -- "AIR FORCE SIX THREE THREE CAUTION TURBULENCE DEPARTING D C EIGHT CLEARED FOR TAKE-OFF" (PX-5 trans. #43, Tr. 320). It was, we submit, gross negligence for flying instructor Shima to take-off immediately, despite receiving the identical transmission from the tower -- "PIPER NINE NINE ZULU CAUTION TURBULENCE DEPARTING DC EIGHT CLEARED FOR TAKE-OFF" (PX-5 trans. #44).

1. There can be no doubt that a reasonably prudent flying instructor would have delayed his take-off upon receiving such a warning. Mr. Joseph Jones, the chief instructor for the largest flying school in the Hawaiian Islands, testified that if he were cleared for take-off and knew of the existence of turbulence in the take-off area, he would not "make the take-off" (Tr. 1337-1338).

When asked by Government counsel whether he would have taken-off immediately, had he (Jones) been the pilot of the Piper on June 19, 1961, knowing that which Shima knew (Tr. 1341), Mr. Jones stated that he would not have taken-off immediately as Shima had done (Tr. 1343). Moreover, Jones stated, if he had taken-off immediately after being cleared, he would have kept the Piper "on the ground until it was past runway 8, where the heavy aircraft had taken-off [from]" (Tr. 1343).

Mr. George Carter, who was general manager of Shima's employer at the time of the accident and a licensed pilot, testified that if he were in a light airplane on runway 4 left and a large aircraft had just taken-off from runway 8, he would not take-off immediately but would "hold" his aircraft (Tr. 1445). It is noteworthy that the situation posed to Carter did not include a turbulence warning (Tr. 1445). Mr. Carter also stated that he has delayed taking-off in an aircraft "many times" after being cleared to perform this maneuver, because of turbulence generated by another aircraft (Tr. 862-863). He did not indicate whether, in those instances, he had received a warning of turbulence from the tower (Tr. 862-863).

Mr. Carter further testified that pilots are not required to take-off upon receiving a take-off clearance; they may refuse the clearance (Tr. 862). Mr. E. J. Kay, the chief flying instructor at Shima's employer, agreed (Tr. 588-589). He testified that the pilot in command of the aircraft is responsible for the acceptance

a clearance (Tr. 601-602). Should the pilot feel that the maneuver for which he has been cleared might be unsafe, he can use the clearance and "ask for a delay . . . of a specified amount of time (Tr. 588-589).^{10/}

2. Certainly, the pilot in command of the Piper could not have believed that the transmission from the tower, clearing his aircraft for take-off, was a command to take-off immediately, especially since the transmission included a warning of a potentially unsafe condition created by the preceding aircraft (PX-5 trans. # 44).

The Piper's pilot was not the ordinary run-of-the-mill licensed private pilot who might have viewed a clearance as a command (See page 24 , n.12 infra). Mr. Shima was a professional pilot, one who earned his living both as a charter pilot, flying planes inter-island for the Andrew Flying Service, and as an instructor pilot, teaching students who attended defendant-Baker's flight school (Tr. 592, 794). As a licensed pilot, he would have been familiar with the Civil Air Regulations, including Section 60.60 thereof, which points out that clearances are not mandatory in nature (See p. 25 , infra). He would also have been familiar with the Flight Information Manual which plainly states that a "clearance . . . is permissive in nature" (GX-6, p. 82). (See p. 25 infra).

It is significant, we believe, that air traffic controllers expect pilots to refuse take-off clearances occasionally and, in addition, to make the final decision as to when, and from where, to take-off (Tr. 269, 998, 1237, 1332, 1369, 1429).

According to Baker's general manager, that Manual was readily available to Mr. Shima and the other instructor pilots employed by the flying school (Tr. 879). Finally, as a flying instructor, Mr. Shima would have had to instruct his students on the matter of the non-mandatory nature of air traffic clearances (Tr. 832). Thus, the Piper's pilot must have been aware, when he received the warning and clearance from the tower, that he was not required to take-off immediately. Had the tower controller wanted him to take-off without delay, he would have issued the following transmission: "CLEARED FOR IMMEDIATE TAKE-OFF" (GX-5, \$439.11).

3. That Mr. Shima knew or should have known of the danger of flying into the turbulent wake of the DC-8 is clear from the record. His employer's chief flying instructor, Mr. Kay, specifically testified that he had "trained Mr. Shima" (Tr. 592) and that Shima was aware of the dangers of wake turbulence (Tr. 626). There is no evidence in the record controverting Mr. Kay's testimony.

Furthermore, even if Shima was unaware of the problem, the overwhelming evidence is to the effect that he should have known of the danger of wake turbulence. For, it was stipulated, that, as of the date of the accident, "[t]he existence of the potential hazards of turbulent wake of large aircraft to smaller aircraft was a matter of 'common knowledge' in the flying industry . . ." (R. 1). Indeed, Shima must have been examined on the subject of wake turbulence prior to receiving his pilot's license and also during

course of the oral examination given by the FAA to those
pots desiring to be flying instructors (Tr. 601).

Aside from the numerous publications which were issued
prior to the accident warning pilots not to fly into the wakes
of large aircraft (See GX-2, GX-3, GX-11, PX-15, PX-36), the
pots' handbook (the Flight Information Manual, GX-6), which was
available to Shima (Tr. 879), informed pilots of the hazards
of wake turbulence and advised them to be "on the alert" for
wake turbulence "when taking-off and landing behind large aircraft"
(1250-1251). Moreover, since it was a universal practice
among flying schools to instruct students on the dangers of
wake turbulence (Tr. 1331) and, inasmuch as Baker's students
received instruction on this subject (Tr. 572), Mr. Shima must
have been familiar with the wake turbulence problem, being a
long instructor employed by Baker. Certainly, if there had
been any doubt in his mind as to turbulence danger the specific
advisory warning from the tower fully alerted him to that danger.

4. In sum, the Piper's pilot was warned of the existence
of the turbulence generated by the DC-8. Furthermore, he knew
he should have known of the danger involved in flying into
wake turbulence in his Piper aircraft. Yet, he decided to
ignore the warning and take-off immediately instead of pursuing
one of the other courses of action available to him. In so doing,
Shima plainly failed to exercise that degree of care which a
reasonably prudent instructor pilot would have done under similar

circumstances. The district court plainly erred, therefore, in not finding this failure on Shima's part to be negligent.

C. Shima's negligence was the sole, proximate cause of Furumizo's death

We demonstrated above (pp.14-20 supra) that the flying instructor was negligent in taking-off immediately despite the warning issued by the tower. Unquestionably, his negligent act was later in point of time than the conduct of the tower controllers which the district court found to be negligent (R. 562). The question still remains, however, as to whether the flying instructor's action breaks any chain of causation established by the controllers' alleged negligence (See page supra). According to the Hawaii Supreme Court, this turns on whether the later act of negligence, i.e., Shima's taking-off immediately, was reasonably foreseeable or not. If it was not, then the reviewing court may hold, as a matter of law, that the chain of causation established by earlier negligent act was broken by the later one. Mitchell v. Branch and Hardy, 45 Haw. 128.

The Honolulu controllers had no reason to believe that Mr. Shima would ignore the warning given him and take-off immediately. Indeed, they had every reason to believe that Shima would heed the warning and wait until the turbulence from the DC-8 had subsided, as the C-47's pilot had done, until beginning the take-off roll. In this regard, chief controller Garcia testified that, on many occasions prior to the accident, he had issued absolute clearance

ht aircraft, waiting to take-off from runways 4 left and 4
ht, when heavy aircraft were taking-off from runway 8, and
t the light aircraft delayed their taking-off therefrom or
ir pilots refused the clearance given (Tr. 1041). The only
er Honolulu tower controller who testified at the trial
. Capellas) stated that prior to the accident pilots had
asionally refused clearances issued by him (Tr. 148). Both
trollers understood clearances to be merely permissive in
ure and they assumed that pilots were aware of this fact
. 237, 269, 998, 1012). Had they wanted Shima to take-off
ediately, they would have, in accordance with the controller's
ual (GX-5, §439.12), issued a clearance to that effect.
Clearly, Shima's reckless action could not have been foreseen.
s, even if the controllers were negligent, in issuing the critical
nsmission when they did, any chain of causation established
their action was broken by Shima's intervening act. His decision
take-off into the wake of the DC-8, in spite of the warning
ued by the tower, was the sole, proximate cause of Mr. Furumizo's
th. Mitchell v. Branch and Hardy, supra.

III. THE DISTRICT COURT ALSO ERRED IN FINDING THAT THE
HONOLULU TOWER CONTROLLERS WERE NEGLIGENT IN THE
PERFORMANCE OF THEIR DUTIES AT THE HONOLULU AIRPORT
AT THE TIME OF THE ACCIDENT INVOLVED HEREIN

The district court also found that the Honolulu controllers
uld have "attempted to exercise their reasonable judgment and
empted to hold up the clearance a sufficient time to minimize

the acute danger" to the Piper which existed by virtue of the turbulence generated by the DC-8 and that "this failure to exercise any judgment under the circumstances constituted negligence on . . . [their] part" (R. 562). We submit, and now show, that the lower court erred in so finding and that, as a result, there is a separate, independent basis for reversing the judgment entered against the United States.

A. The transmission to Piper was a conditional, not absolute, clearance for take-off

The district court, in finding the Honolulu controller negligent, stated that the tower operators should have exercised "their reasonable judgment" and "[held] up the clearance" to the Piper until the turbulence danger had passed (R. 562). But this finding was based on the notion that, when the local controller said to the Piper's pilot "PIPER NINE NINE ZULU CAUTION TURBULENCE DEPARTING DC-EIGHT CLEARED FOR TAKE-OFF" (PX-5 trans. # 44), this transmission meant that the Piper aircraft was authorized, from that moment on, to initiate its take-off roll. There is, however, absolutely no support for that notion. Indeed, it is squarely refuted by the actual text of the transmission message.

Had the Honolulu controller merely told the Piper's pilot that his aircraft were "cleared for take-off," the Piper would, unquestionably, have had authority to begin its take-off roll any time thereafter (See n.12 , p. 24-25 , infra). But, in the instant case, the controller did not issue such an absolute

clearance to the Piper's pilot. Rather, the clearance issued to the Piper aircraft was a qualified one, that is, the Piper was authorized take-off only after its pilot determined that the turbulence created by the DC-8 had subsided. In other words, the court had issued a conditional clearance to the Piper; the clearance did not become effective until the Piper's pilot was convinced that the turbulence danger had passed. Thus, contrary to the court's finding, the Honolulu controllers had, in fact, "held up" the issuance of the clearance to the Piper. Its negligence finding cannot, therefore, stand.

B. No duty on controllers to delay issuance of take-off clearance because of turbulence danger

Even if the transmission discussed above were deemed not to constitute a conditional clearance to take-off, the lower court's negligence finding must still be overturned. For, that finding is grounded on the premise that control tower operators have a duty to lengthen the separation between departing aircraft, by withholding the second craft's take-off clearance, when there is a danger that it will encounter wake turbulence. There is no basis, we submit, for the court's imposition of such an obligation on controllers.

Section 26.26 of the Civil Air Regulations provides that tower controllers "shall control [air] traffic in accordance with the procedures and practices . . . prescribed in the appropriate air traffic manuals of the Federal Aviation Agency . . ." 14 C.F.R. 26.26 (61 Rev.). These manuals have been described by this Court as "bible for tower operators." United States v. Miller, 303 F. 2d 710, n. 16, certiorari denied, 371 U.S. 955. The manual used (continued)

1. It is apparent from a reading of the district court's opinion that the lower court imposed on controllers a duty to delay issuing clearances in wake turbulence situations because it believed, "a pilot or pilots in a small plane like the Piper . . . might interpret the clearance as . . . [a] command for immediate take-off" and, in complying with the "command", expose himself or themselves to an "enormous hazard" (R. 598).^{12/} And, according to the court below, the tower personnel "should have . . . anticipated" that such pilots might have viewed a clearance in this light (R. 598). The district court clearly erred in this regard since controllers had every reason to believe, as of the date of this accident, that licensed pilots -- and certainly flying instructors -- understood that air traffic clearances were permissive in nature.

It is undisputed that, in order to be licensed as a private

11/ Continued

by tower personnel, as of the date of the accident, is commonly referred to as the ATM-2-A Manual (Tr. 268). That manual (GX-5) sets forth the various duties and responsibilities of air traffic controllers as of June 19, 1961. See Hartz v. United States, 249 F. Supp. 119, 123 (N.D. Ga.) (a notice of appeal has been filed in that case).

The Manual contains no provision to the effect that controllers must lengthen the separation between departing aircraft in wake turbulence situations (GX-5). Rather, it provides that "when controllers foresee the possibility that departing aircraft might encounter -- thrust stream turbulence or wing tip vortices from preceding aircraft" they should issue "cautionary information to this effect . . . to the pilots concerned" (GX-5 §411.7). The incident involved in this case clearly comes within this proviso. (See pages 32-33, infra).

^{12/} The court below did recognize, however, that an air traffic clearance is "a mere authorization and not a command" (Tr. 597).

(Continued)

ot by the FAA, one had to pass an examination on the Civil
Regulations and, in particular, on Part 60 thereof (Tr. 860).
is also undisputed that FAA approved flying schools, like that
rated by defendant-Baker, are required to instruct their
dents on the Civil Air Regulations (Tr. 853). Among the
ulations which licensed pilots should have been familiar
h therefore, is Section 60.60 which states that an air traffic
arance is an "[a]uthorization by air traffic control . . . for
aircraft to proceed under specified traffic conditions . . ."
C.F.R. 60.60 (1961 Rev.). In addition, the Flight Information
ual states that "a clearance issued by a tower (such as 'cleared
land') either by radio or visual signal is permissive in nature
does not relieve the pilot from exercising a reasonable degree
caution . . ." (GX-6, p. 82). Since this manual was considered
be the pilot's "handbook" (Tr. 271), licensed pilots should
e known that clearances issued by tower personnel were not
the nature of a command to execute some maneuver.

Significantly, the controllers who testified in the court
ow were of the belief that, after issuing a take-off clearance
an aircraft, it was then up to the pilot to decide what action
take (Tr. 998, 1012, 1149). They believed that the pilot could

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re can be no doubt that a clearance to take-off is permissive
nature; a pilot is not required to take-off immediately upon
eiving the communication. See New York Airways, Inc. v. United
tes, 283 F. 2d 496 (C.A. 2); Khourey v. American Airlines, Inc.,
Ohio St. 310, 164 N.E. 2d 402; see also United States v. Miller,
ra, at p. 710.

refuse a clearance (Tr. 148, 1041, 1321), that he had authority to request a change in the clearance (Tr. 269, 1250) and that, once cleared for take-off from a particular point on a runway, he was free to taxi back and use the entire runway for his take-off (Tr. 237, 249, 1038). Their views on this matter were shared by the several pilots who testified in the lower court (Baker's chief flying instructor, Tr. 588, 593, 599, 641-642, 667; Baker's general manager, Tr. 832, 840, 841, 862; and flying instructor Jones, Tr. 1332, 1338).^{13/}

There is, therefore, no basis for the court's finding (R. 598) that the Honolulu tower personnel "should have . . . anticipated that a pilot or pilots in a small plane like the Piper . . . might interpret the clearances as [a] . . . command for immediate take-off . . ." Indeed, the evidence discussed above compels a holding to the contrary, especially in view of the fact that the clearance was coupled with a warning of the existence of wake turbulence in the take-off area.^{14/} Since the lower court

^{13/} The pilots' Flight Information Manual instructs pilots "to bear in mind that they have the authority to ask for a change in clearance" (GX-6, p. 82). Mr. Carmody, the air traffic control specialist, testified, in this connection, that he never encountered a pilot who didn't know that he had the right to request a change in a clearance (Tr. 1250).

^{14/} In determining that many pilots do not understand the nature of a clearance, the lower court relied, apparently, on certain statements made by Baker's general manager, Mr. George Carter and plaintiff exhibit 19 (R. 590-591). To be sure, Mr. Carter had testified that in his opinion, many pilots were under the impression that a clearance was in the nature of a command (Tr. 832). But, in light of the evidence discussed above (pp. 24-26, supra), we submit that it was unreasonable for the court to infer from this statement that the tower operators should have anticipated that the Piper's pilot

(Continued)

position of a duty to delay was based, in part, on the court's erroneous belief regarding air traffic clearances, its duty finding cannot be sustained.

2. In concluding that controllers must do more than issue warning in wake turbulence situations, but must make certain that no aircraft takes-off until the wake turbulence danger has passed, the district court has, in effect, shifted the ultimate responsibility for the safe operation of aircraft from the licensed pilot to the FAA tower personnel. The courts, however, have consistently held that the direct and primary responsibility for the safe operation of an aircraft rests, not with the controllers, but with the aircraft pilot. United States v. Miller, 383 F. 2d 703, 710 (C.A. 9), certiorari denied, 371 U.S. 955; United States v. Schultetus, 277 F. 2d 322, 326 (C.A. 5), certiorari denied, 364 U.S. 828; Wenninger v. United States, 234 F. Supp. 499, 506-517 (D. Del.), aff'd., 352 F. 2d 523 (C.A. 3); Smerdon v. United States, 135 F. Supp. 929, 931-932 (D. Mass.).

In United States v. Miller, supra, this Court reversed the decision of the lower court, which had held the United States

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any other pilot might construe the clearance issued as a command. With respect to plaintiff's exhibit 19 (CAR Draft Release 0-1), we note that that document was merely a notice of proposed rule-making and that the rules proposed therein were never promulgated by the agency (Tr.1198-1199). In any event, it does not support the court's finding that many pilots viewed a clearance as a command or an order to execute some maneuvers (PX-19).

liable for the negligence of its control tower personnel in failing to prevent the mid-air collision between a Beechcraft and a Cessna within an FAA controlled zone. The Court, in holding the Beechcraft's pilot negligent, stated, that "the focal point of ultimate responsibility for the safe operation of an aircraft under VFR weather conditions rests with the pilot. Under such conditions, he is obligated to observe and avoid other traffic even if he is flying with a traffic clearance." 303 F. 2d at 710.^{15/} The tower controller, on the other hand, "is merely [required] to assist the pilot in the performance of his duties, not to relieve him of those duties." 303 F. 2d at 711.

Similarly, in Schultetus, the Fifth Circuit held, with respect to the district court's finding that certain controllers were negligent in failing to instruct a pilot to alter his course so as to avoid colliding with another aircraft, that:

The theory followed by the district court would place upon the operators of control towers the primary responsibility for the operation of aircraft at the field. Governmental regulations, having the force of law, have assigned this responsibility to the operators of aircraft.

In addition, the court of appeals stated that the lower court erred in finding that the tower operators negligently failed to maintain proper spacing between two aircraft within the control zone. The

^{15/} The weather at the time of the accident involved herein was such that visual flight rules were in effect (R. 377).

fifth Circuit noted (277 F. 2d at 327):

Here again the district court has overlooked the principle that the direct and primary responsibility for the operation of aircraft over or in the vicinity of an airport rests upon the pilots of the aircraft. We are of the belief that in this respect also the district court was in error.

And in Wenninger v. United States, supra, in which plaintiffs' decedent was killed when his aircraft crashed allegedly as a result of encountering wake turbulence generated by an Air Force C-124, the trial court ruled that decedent's failure to observe and avoid the C-124's turbulence constituted negligence on his part. The court, citing this Court's decision in Miller, stated that "[u]nder VFR weather conditions, the ultimate responsibility for the safe operation of an aircraft rests with the pilot. He is under a duty to see and avoid other traffic even if flying with a traffic clearance." 234 F. Supp. at 516-517.

Recently, the District Court for the Northern District of Georgia had occasion to pass on the very question involved in this case. Hartz v. United States, 249 F. Supp. 119. There, as here, the plaintiffs had contended that the tower operator "should have delayed the take-off clearance [issued to the Beech Bonanza] so as to permit the vortex turbulence [created by the departing DC-7] to dissipate." 249 F. Supp. at 125. The court, relying on the cases discussed above, refused to impose such a duty on the air traffic controllers, reasoning that (Ibid.):

[T]he ultimate responsibility for the take-off at that or any other time rests with the pilot; the pilot, not the controller, was in position to delay his take-off if he felt it to be his benefit to do so.

For the same reasons, we believe, it was clear error for the court below to impose a duty to delay on the Honolulu controller.

Were the lower court's duty finding to stand, this would, in effect, make the Government an insurer of flight safety. To be sure, the controller is required to perform his duties fully and properly, but this does not require him to warn one aircraft of the presence of another craft in the control zone when no danger of collision between the two existed (Franklin v. United States, et al., supra), nor warn an aircraft of danger from helicopter wake turbulence when the helicopter turbulence problem was then unknown to the aviation industry (Franklin v. United States, supra), nor give a general warning signal to the pilot of one aircraft concerning the presence of another in the control zone when the latter knew of the presence of the former (United States v. Schul supra), nor determine whether a particular weather condition is safe enough for an aircraft to land when the pilot of the craft has been fully advised thereof (Smerdon v. United States, 135 F. Supp.

16/ It must be remembered that "an air traffic controller is not supposed to give his attention to any one aircraft in the control zone if other aircraft are present. All aircraft within the control zone should have the controller's attention." Franklin v. United States, 342 F. 2d 581 (C.A. 7), certiorari denied, 382 U.S. 844; see also New York Airways, Inc. v. United States, 283 F. 2d 496, 498.

, 923 (D. Mass.)), nor observe a small aircraft enter the control zone on a hazy day when the aircraft had made no radio contact with the tower (Stanley v. United States, 239 F. Supp. (N.D. Ohio).^{17/} By the same token, we do not believe that an traffic controller is required, after warning a pilot of the turbulence danger, to delay clearing the pilot's aircraft for take-off until that danger has passed. It is the pilot's responsibility alone to decide when to initiate the take-off.

C. No breach of any duty owed by the government controllers
The evidence before this Court clearly establishes that control tower operators performed all the duties required of them under the circumstances and that they performed them in a reasonable and proper manner. The record reveals that as the Piper was in the process of executing a touch-and-go landing on runway 4 left, it was instructed by local control tower operator Humphreys^{18/} to make " . . . A FULL STOP [AND] TO HOLD SHORT OF [RUNWAY] EIGHT IF POSSIBLE" (PX-5 trans. # 19, Tr. 964).

The court below appears to rely (R. 573) on Johnson v. United States, 183 F. Supp. 489 (E.D. Mich.) which involved the crash of a light aircraft that had been cleared to land at a FAA controlled airport at which a B-47 jet bomber had been making practice approaches. The court held that the proximate cause of the crash was the negligence of the light aircraft's pilot to execute the proper traffic pattern. The court indicated that the tower operator should have taken into consideration the effect of the turbulence created by the B-47 in issuing the clearance to land. Since the court denied the plaintiffs any recovery because of the negligence of the light aircraft's pilot, the court's duty statement is plainly dictum.

Mr. Humphreys did not testify at the trial, having died prior to the trial (Tr. 926-927). He received his instructions from chief controller Garcia (Tr. 231, 984).

The Piper was so instructed because an Air Force T-33 and a Japan Airlines DC-8 were about to depart from the airport on runway 8 (Tr. 92, 964). The Piper acknowledged the transmission and stopped on runway 4 left, near the midfield taxi strip, some 900 feet south of the intersection of runways 4 left and 8 (Tr. 8229, PX-1).

After issuing instructions and information to other aircraft in the control zone the tower cleared the T-33 for immediate take off and shortly thereafter cleared the Japan Airlines DC-8 for take-off (Tr. 966-969, PX-5). Nine transmissions later, the local control operator cleared a Cessna 150, located on runway 4 left just north of the intersection of runways 4 left and 8, for take-off from 4 left (Tr. 973-974). Then, the controller advised the C-47, located at the end of runway 4 right: "AIR FORCE SIX THREE EIGHT CAUTION TURBULENCE DEPARTING DC EIGHT CLEARED FOR TAKE-OFF" (PX-5 trans. # 43, Tr. 974). Thereafter, defendant-Baker's aircraft received the following transmission from the tower: "PIPER NINE NINE ZULU CAUTION TURBULENCE DEPARTING DC-EIGHT CLEARED FOR TAKE-OFF" (Tr. 974, PX-5). At the moment the warning and clearance were given to the Piper, the DC-8 was airborne just beyond the end of runway 8 (Tr. 984, 1077).^{19/} Upon receiving the transmission

^{19/} Apparently, Mr. Humphreys had issued the warning and clearance to the Air Force C-47 just after the airborne DC-8 had passed the intersection of runway 4 right (Tr. 1076).

m the tower, the Piper -- unlike the C-47 (Tr. 317-318) -- immediately began its take-off roll (Tr. 234, 1077). At this time, the DC-8 was south of Sand Island, on a heading of 150 degrees, approximately 2 miles beyond the intersection of runways 8 and 4 left (Tr. 1069, 1077, PX-1).

Thus, the separation between the Piper and the DC-8, at the time the Piper received the clearance, was greater than the minimum prescribed in the air traffic controller's Manual (Section 422.2, 5) for two departing aircraft.^{20/} And, at the time the Piper began its take-off roll, the distance between the two aircraft was substantially greater (PX-1). Moreover, the chief controller fully complied with Section 411.7 of the Manual (GX-5) when, in foreseeing the possibility of the Piper encountering the turbulence created by the DC-8, he instructed the local controller to issue cautionary information regarding such turbulence to the Piper (Tr. 995). In accordance with the phraseology recommended in the controller's Manual (Section 439.1Q), the local controller issued the turbulence warning and then, since no collision hazard existed, cleared the aircraft for take-off subject to that warning (Tr. 974).^{21/}

The district court stated, in its opinion, that it agreed with the contention of the plaintiffs and defendant Baker that, at the time of the accident, neither the applicable laws and rules nor any regulations or directives of the aviation authorities of the United States government prescribed any separation standards for runways that intersect" (R. 592). The court's determination is contrary not only to the uncontroverted testimony of the air traffic controller, but also to the testimony of controllers Cappellas and Garcia (R. 243, 1166-1167).

On pages 24-26 supra, we showed that a clearance is not a command to do something, but rather an authorization to do it.

Certainly, it cannot be said that the Honolulu tower controllers breached any duty owed to Messrs. Shima or Furumizo. The fact that the pilot in command of the Piper "elected" to take off immediately (Tr. 234) does not, in any way, establish negligence in the conduct of any of the government controllers.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment entered against the United States should be reversed.

Respectfully submitted,

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June 1966.

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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APPENDIX

1. The Federal Tort Claims Act, 62 Stat. 933, 982, as amended, 28 U.S.C. 1346(b), 2671, et seq., provides in pertinent :

28 U.S.C. 1346(b):

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. The Civil Air Regulations (14 C.F.R. 1, et seq. 1 Rev.)) provide in pertinent part:

§60.1 Scope. The air traffic rules in this part shall apply to aircraft operated anywhere in the United States, including the several States, the District of Columbia, and the several Territories and possessions of the United States, including the territorial waters and the overlying airspace thereof,

* * * * *

§60.2 Authority of the pilot. The pilot in command of the aircraft shall be directly responsible for its operation and shall have final authority as to operation of the aircraft.

* * * * *

§60.10 Application.

Aircraft shall be operated at all times in compliance with the following general flight rules and also in compliance with either the visual flight rules or the instrument

flight rules, whichever are applicable.

§60.11 Preflight action.

Before beginning a flight, the pilot in command of the aircraft shall familiarize himself with all available information appropriate to the intended operation. Preflight action for flights away from the vicinity of an airport, and for all IFR flights, shall include a careful study of available current weather reports and forecasts, taking into consideration fuel requirements, an alternate course of action if the flight cannot be completed as planned, and also any known traffic delays of which he has been advised by air traffic control.

§60.12 Careless or reckless operation.

No person shall operate an aircraft in a careless or reckless manner so as to endanger the life or property of others.

§60.21-1 Air traffic clearance^{3/} (FAA policies which apply to §60.21).

(a) When an air traffic clearance has been obtained under either VFR or IFR rules, the pilot in command may not deviate from the provisions thereof unless an amended clearance is obtained or an emergency exists. Pilots desiring to make a change in altitude, route, or destination should request the change from an appropriate communications facility and receive Air Traffic Control approval prior to making the change.

3/ An air traffic clearance is an authorization by Air Traffic Control for an aircraft to proceed under specified traffic conditions within a control zone or control area. It is issued for the purpose of preventing collision between aircraft known to Air Traffic Control and does not constitute authority to violate any provision of the CAR. * * * *.

An air traffic clearance provides separation from other aircraft only during that portion of a flight conducted in weather conditions less than VFR minimums. It is the direct responsibility of the pilots to avoid other aircraft when flying in VFR conditions even with a traffic clearance. * * * *.

§60.60 Definitions.

As used in this part, terms shall be defined as follows:

* * * * *

Air traffic. Aircraft in operation anywhere in the airspace and on that area of an airport normally used for the movement of aircraft.

Air traffic clearance. Authorization by air traffic control, for the purpose of preventing collision between known aircraft, for an aircraft to proceed under specified traffic conditions within controlled space.

Air traffic control. A service operated by appropriate authority to promote the safe, orderly, and expeditious flow of air traffic.

* * * * *

VFR. The symbol used to designate visual flight rules.

VFR conditions. Weather conditions equal to or above the minimum prescribed for flights under VFR.

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No. 20,641

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA
and BAKER AIRCRAFT SALES, INC.,
*Defendants, Appellants and
Cross-Appellees,*

vs.

BETTY K. FURUMIZO, et al.,
*Plaintiffs, Appellees and
Cross-Appellants.*

On Appeal from the United States District Court
for the District of Hawaii

**BRIEF FOR THE PLAINTIFFS, APPELLEES
AND CROSS-APPELLANTS**

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No. 20,641

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**On Appeal from the United States District Court
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**BRIEF FOR THE PLAINTIFFS, APPELLEES
AND CROSS-APPELLANTS**

JURISDICTIONAL STATEMENT

Appellees and Cross-Appellants Betty K. Furumizo, et al., hereinafter referred to as "Plaintiffs", adopt and incorporate herein the jurisdictional statements of Appellants, hereinafter referred to as "defendant USA" or "appellant USA" or "the Government" and "defendant Baker", or "appellant Baker" or "Baker" respectively, as are more fully set forth in the Decision of the Court below filed on June 21, 1965, and

more particularly paragraphs 3, 4 and 5 thereof (R. 545). The following are the pertinent pleadings necessary to show jurisdiction: the Amended Complaint (R. 12-15), later amended by Stipulation (R. 82-83), the Second (Final) Amended Complaint (R. 695-698), the Pre-Trial Order (R. 371-380) and the amendment thereto (R. 625).

STATEMENT OF THE CASE

With a few minor exceptions which are not considered worthy of comment, Plaintiffs do not controvert the Statement of the Case set forth in the Government's Brief. (E.g., G.Br. p. 4 last sentence and Decision para. 31, R. 555, 556.) However, with respect to any "facts" which this Court might deem material and disputed Plaintiffs would prefer to rely on the findings of fact set forth in paragraphs 12-32 of the Decision (R. 548-557) and the ultimate facts relating to liability set forth in paragraphs 34-42 of the Decision (R. 557-562).

Appellant Baker's Statement of the Case presents a more difficult problem. Beginning with the last paragraph on page 4 of Baker's Brief it becomes argumentative and such portions are therefore controverted.

Plaintiffs' theory of the case with respect to appellant Baker was amended by the filing, with the approval of the Court below, of the Second (Final) Amended Complaint (R. 695-698) and by Order of the Court below (R. 648-649) granting plaintiffs'

Motion to Amend Amended Complaint (R. 624-626) which specifically amended

“the theories of the Plaintiffs against the defendant Baker as set forth in the Pre-trial Order as follows:

‘Plaintiffs further contend that under 28 U.S.C. §1332 as citizens of the State of Hawaii they have a claim in an amount exceeding, exclusive of interest and costs, the sum of \$10,000.00 against the defendant Baker as a California corporation with its principal place of business in California, *for its negligence in failing to furnish decedent with an adequately informed and trained instructor pilot*, and for the negligence of its employee Charles Isamu Shima (hereinafter referred to as “Shima”) while acting within the scope of his employment as pilot in command of the aircraft in which he was giving dual instruction for hire to the decedent as a student pilot, in taking off or allowing the decedent to take off directly into the jet-wash of the DC-8 aforesaid in spite of his knowledge as well as a specific warning given to him of the hazard involved and in failing thereafter to maintain safe control of the aircraft under the circumstances, thereby causing the aircraft to crash, resulting in the death of the decedent and damages to the plaintiffs as hereinafter more fully set forth.’” (R. 625, 626) cf. B.Br. 4-5 and 11.

The references to the testimony (transcript) beginning at the bottom of page 5 of Baker’s Brief and continuing to the bottom of page 8 are argumentative, are therefore controverted and will be covered in argument, *infra*.

The quotations from the Decision of the Court below extending from the bottom of page 8 of Baker's Brief to the bottom of page 10 are isolated out of the total context of the Decision and therefore argumentative and are controverted as inappropriate to a statement of the case. A reading of the Decision as a whole leads to the inevitable conclusion that the Court below found as a fact that Baker's instructor, Charles I. Shima, himself was negligent in taking off or allowing the Decedent to take off under the circumstances. This is positively confirmed by the colloquy between the Court below and counsel which took place at the arguments on the motions for new trials as follows: (Mr. Crumpacker continuing)

“When I originally read the decision, I had, myself, interpreted as being inherent in the whole decision that Shima was, in fact, negligent, and I think I made that very clear in my memorandum, that——

The Court: Yes. You've covered it; and I agree with you. I think that if the Court had intended to hold that Shima was entirely free from negligence, the Court would have said so.

Mr. Crumpacker: But I'm concerned because of Mr. Padgett's interpretation. I wonder if it wouldn't be wise for the Court, under the rule, to clarify its decision at this point?

The Court: I don't think that's necessary, Mr. Crumpacker.

Mr. Crumpacker: Well, then, may we understand, for the record, that it was the Court's intention, in the writing of the decision, to find that Shima was negligent?

The Court: Well, I've already said that, Mr. Crumpacker”. (Tr. 15, October 1, 1965.)

The matter appearing in the last paragraph of Baker's Statement (B.Br. 11-12), pertaining to the arguments urged on the motions to amend and for new trials is also argumentative and therefore controverted. Baker's own direct duty to the Decedent (as contrasted with its vicarious liability for the negligence of Shima) was placed at issue in the trial by way of Plaintiff's Trial Memorandum (R. 302, 303) filed February 28, 1965, well in advance of trial, setting forth the authorities establishing the high degree of care required of a flying school toward its students, which standard was adopted by the Court below in paragraphs 36, 55 and 68 of its Decision, (R. 558, 574, 598). Moreover as will be demonstrated in argument, *infra*, the extent and adequacy of instructor Shima's training by Baker and the relative standards in the community were issues which were in fact fully tried.

With respect to the question of damages, the Court's findings fully set them forth in paragraph 70 of the Decision. (R. 599-605.)

In calculating the special damages, the Court below did not make any adjustment to compensate for the decreasing value of the dollar (D. para. 70(g), R. 602), did not include any interest on the Decedent's earnings which would have been contributed to the family from the date of death to the entry of judgment (D. para. 70(h), R. 602, 603), did deduct the estimated income taxes from Decedent's anticipated future earnings in calculating the present value of the portion thereof which the Court found he would have

contributed to his family (D. para. 70(i), R. 603, 604; para. 71(b), R. 606, 607) and did not allow to the estate the \$250 portion of the reasonable burial costs which was paid by the Veterans Administration (D. para. 71(a), R. 605).

In determining the amount of general damages to be awarded to the plaintiff-wife of Decedent the Court below placed itself in the position of average citizens and jurymen in the community (D. para. 71(d), R. 612) rather than exercising its own individual judgment, and also took into consideration plaintiff-wife's prospects of remarriage, health and earning capacity (D. para. 71(d), R. 610).

QUESTIONS PRESENTED¹

1. The liability of the defendant United States of America through the negligence of its employees, the Honolulu tower controllers.

2. The liability of the defendant Baker for (a) the negligence of its instructor Shima; and, (b) its own negligence in failing to furnish to the Decedent an adequately informed and trained instructor pilot in Shima, and whether this latter question was fully and

¹No issue has been made by either appellant as to the actual cause of the accident nor as to the admission or rejection of any evidence. See Rule 18, 2 (d) of the Rules of this Court. This writer is uncertain as to the extent to which any findings of the Court below have been reserved as error and whether either appellant has stated in its specifications of error "as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous". Rule 18, 2 (d) of the Rules of this Court.

fairly tried on the issues joined in the Court below, and if not whether the Judgment against Baker should nevertheless be allowed to stand.

3. Whether in law and/or in fact the Decedent was properly held not to have been contributorily negligent nor to have assumed the risk leading to his death.

4. The question of proximate cause and whether the negligence of both defendants or their employees proximately caused or contributed to the accident.

5. Whether the amount of the judgment below was erroneously determined and was thus excessive or inadequate.

SPECIFICATIONS OF ERROR ON CROSS-APPEAL

1. The District Court erred in failing to adjust the "special damages" to compensate for the decrease in the value of the dollar throughout the period of the Decedent's life expectancy based upon the law and the evidence, including matters of judicial notice.

2. The District Court erred in failing to allow prejudgment interest as required by law.

3. The District Court erred in deducting, contrary to law, estimated income taxes from Decedent's anticipated future earnings in calculating the present value of the portion thereof which the Court found he would have contributed to his family.

4. The District Court erred in refusing to allow the \$250 portion of the reasonable burial costs which was paid by the Veterans Administration as damages

to the estate against the defendant Baker as required by law.

5. The District Court erred in its determination of the general damages allowed to the wife of Decedent by the Court placing itself in the position of an average citizen and jurymen in the community rather than based on the Court's own individual judgment, as required by law.

6. The District Court erred in its determination of the general damages allowed to the wife of Decedent by taking into consideration her (favorable) prospects of remarriage and her employment, health and earning capacity, contrary to law.

STATUTE AND REGULATIONS INVOLVED

In addition to the statute and regulations set forth in the appendix to the Government's Brief (G.Br.), others considered material to the Court below are set forth in paragraphs 57-63 of the Decision (R. 575-581).

SUMMARY OF ARGUMENT

The Supreme Court has held, and this Court has followed the principle, that in any given situation where air traffic is being controlled (by the Federal Government) there are concurrent duties devolving on the pilots of the aircraft and the tower controller personnel. Each case must be decided on its own facts since the ultimate question is one of fact. Therefore

the sole test is whether there was *any* evidence which would sustain the trial court's findings. It would be only in the absence of any such evidence that the findings could be disturbed as being "clearly erroneous". The function of this Court is not to try the case *de novo* on the whole record. (Although the foregoing principles are elementary, the arguments of both appellants in many instances have totally overlooked them.)

There was evidence to sustain the finding of the Court below that the tower controllers did not act "according to the book" (ATM-2-A) and were thus negligent. There was overwhelming evidence upon which it was found that the Manual was not the sole controlling authority but was supplemented by specific directives addressed to the standard required of the controllers in instances such as involved in this case which they openly and admittedly failed to follow. Moreover, as a matter of law a Manual which does *not* have the force and effect of law cannot be relied upon to establish a standard of care. And in any event, regardless of whether the action of a tower operator in any particular instance is customary, it still may be, and was found as a matter of fact in this case to be, negligent.

There was conflicting evidence on the meaning of a clearance for takeoff from which the trial court made its finding of fact to the effect that implicit therein was the representation that it was safe to proceed in accordance therewith. Thus the Court held as an ultimate fact that the conduct of the tower operators in

issuing such a clearance was negligent under the circumstances, and this was supported by the open and naive admissions of the chief controller himself.

As mentioned, each such case must be decided on its own facts. Therefore it is unprofitable to attempt to compare the decisions of other courts in other cases. Nevertheless, a review of all the decisions involving comparable situations supports the principles of law applied by the Court below and the ultimate finding of the negligence of the control tower operators.

With respect to Baker, there is no question either in law or in fact that its instructor Shima, as the pilot in command, was the person responsible for the *operation* of the aircraft. Although Baker attempted to make a factual issue of this, the overwhelming evidence led the Court below to such an inevitable finding.

The cause of the accident is here undisputed by either appellant. Knowing the cause, the uncontroverted evidence again led the Court below to the only possible finding that Shima's negligence in taking off under such circumstances, with the specific warning which was given and the general knowledge with which he was charged, was a direct and proximate cause of the accident.

Once more we have a factual question which was decided by the trial court. Therefore a comparing of cases is unprofitable. The cases cited by Baker are clearly distinguishable since in each of them, unlike here, the *cause* of the crash was unknown.

The Court below also found on the alternative ground that Baker was negligent in not furnishing to the Decedent an adequately informed and trained instructor pilot in Shima. This was an issue fully tried through testimony relating to Shima's training and the standards of training of instructor pilots in the community. This involved also a question of law relating to the high degree of care owed by a flying school to its students.

Thus, there were two separate findings of fact of negligence leading to the liability of Baker, both of which are supported by substantial and even overwhelming evidence: (1) Baker was liable for the negligence of its employee Shima in taking off under the circumstances, and (2) Baker breached its duty to the Decedent in failing to exercise the high degree of care required of it to make certain that Shima was an adequately informed and trained instructor which the Court found he was not.

Although not expressly pleaded the latter issue was fully and fairly tried and the Court properly allowed an amendment to the Complaint and Pre-trial Order to conform to that evidence and finding of fact.

With respect to the duties and conduct of the Decedent, once more, as a matter of law *and* fact he could not be and on the evidence was held not to be responsible in the circumstances as an unsoloed student, either under the theory of contributory negligence or assumption of risk.

The legal conclusion to this effect is correlative to the argument relating to the duties of the instructor

as the pilot in command. The factual finding to this effect by the Court was supported by substantial and even overwhelming evidence and, therefore, cannot be disturbed on appeal.

On the question of causation, the Court below found as a fact, based on all the evidence, that the negligence of Baker in failing to furnish an adequately informed and trained instructor was a continuing breach of its duty to the Decedent which joined with the negligence of the tower operators in contributing to the cause of the accident. In addition, the evidence that the tower operators should have foreseen, and actually stood by and watched, the negligence of Shima in taking off amply supports the Court's finding of "joint" causation under the law of Hawaii.

With respect to the amount of the damages, the Court below found from ample evidence "with reasonable certainty" what the Decedent's future income would be, thereupon calculating the special damages. This finding is adequate and conclusive under the standards of law applicable in such cases in Hawaii and more than overcomes the "clearly erroneous" test on appeal.

The award of \$15,000 to the estate for the fear of impending death and the pain and suffering of being burned alive endured by the Decedent is supported by the evidence as well as other "comparable" cases, and cannot be said to be so shockingly excessive as to warrant interference by this Court, particularly where the award was made by a trial judge. Inherent in the

award is a review by the Court below of the question of its excessiveness.

The *inadequacy* of the damages presented in the Cross-appeal involves, with one exception, questions of law only. The one exception was the failure of the Court below to take into consideration the direct and circumstantial evidence relating to the future decreasing value of the dollar in calculating the special damages. In other portions of the decision the Court did take judicial notice of the current and past decreasing value of the dollar but it flatly rejected the law and the evidence relating to the future. Where there is clear and positive evidence supporting such a claim it would appear to be erroneous for the trier of fact to reject it *in its entirety*. The pay raises placed in effect *since* the trial below establish that the Court's calculations are erroneous at the very least in the amounts reflected in those raises.

The Court below failed to allow pre-judgment interest contrary to the weight of well-reasoned authority which is becoming more predominant in the recent decisions pertaining to death cases. It is fair to assume that the Supreme Court of Hawaii when and if faced with the issue would follow this trend, particularly where the backlog is causing such extensive delays in getting cases to trial.

On the issue of income taxes, the Court below followed what it felt was the better reasoned and more modern minority view in taking into consideration income taxes and thereby "discounting" the special

damages. Since then the Supreme Court of Hawaii has followed the majority view and therefore this Court has no alternative but to direct the Court below to conform.

For unexplained reasons the trial Court failed to follow the collateral source doctrine and the precedent set by this Court and thus erroneously refused to award the \$250 Veterans Administration burial allowance as an element of special damages to the Estate of Decedent against the defendant Baker.

With respect to the general damages awarded to the wife of Decedent, the Court below adopted several erroneous theses and considerations. The trial judge "second guessed" what a local jury might award rather than making his own evaluation of such element of damages, taking into consideration the extent of the special damages. The net effect of this approach was that the trial judge took judicial notice that jury verdicts are low in this District and discounted the damages accordingly, contrary to his duty under the law. In so doing he improperly took into consideration the wife's youth (attractiveness), favorable prospects of remarriage, employment, health and earning capacity. Each one of these considerations is irrelevant in a determination of the damages to a wife for the loss of her husband's "love, affection, society, companionship, comfort, consortium, protection, fellowship, marital care, attention, advice and counsel".

ARGUMENT

I. SCOPE OF REVIEW AND APPLICABLE PRINCIPLES OF LAW.

The Government acknowledges and the Plaintiffs espouse the principle which requires this Court to sustain the findings of the trial Court unless, after reviewing all the evidence, it is left with a firm impression that error has been committed and the findings of the Court below were "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure. (G.Br. 8 and cases there cited.)

This is particularly true where the evidence is controverted and the trial judge has thus had to weigh the evidence and evaluate the credibility of the witnesses; and where the evidentiary findings are not "clearly erroneous" *and are consistent with the ultimate findings* the judgment will not be disturbed. *Mitchell v. Branch and Hardy*, 45 Haw. 128, 139-40.

As this Court has said, whether or not the action of the tower controllers in any particular instance constitutes negligence, is a question to be determined by the trier of fact. *United States v. Douglas Aircraft Co.*, 169 F. 2d 755 (C.A. 9).

The problem arises when the determination of an ultimate fact involves a question of law and whether or not the trial court properly applied the substantive law to the facts which it found and thus arrived at an accurate ultimate fact finding. This is the principle espoused by the Government wherein it states "quite apart from evidentiary matters, where findings of fact are induced by erroneous interpretations of the law,

they are not binding on the reviewing court". (G.Br. 8, citing authorities.)

A review of those authorities confirms that the ultimate question in each case was one of law. *United States v. Miller*, 303 F. 2d 703 (C.A. 9), cert. denied, 371 U.S. 955, being closest to the case at bar and having been decided by this Court will be singled out as most typical and controlling. In that case, this Court found that the Court below was in error in arriving at an ultimate finding of fact that the decedent Miller was not contributorily negligent because it failed to find *as a matter of law* that he had a duty under the circumstances to maintain a "reasonable lookout" or "to look thoroughly and diligently," which was not relieved by any duty on the part of the tower controller. 303 F. 2d at 708-710.

Plaintiffs agree with the thesis of the Government as to the applicability of the general rules of tort law to this case, i.e. the general principles of negligence law applicable to aviation under the substantive standards of negligence of the State of Hawaii, *in the absence of special statutes*. (G.Br. 9, citing authorities.)

More specifically it is agreed that, "Under Hawaii law, as in all common-law jurisdictions, it is axiomatic that the essential elements of a cause of action in negligence are (a) the existence of a duty on the part of the defendant(s), (b) the negligent failure to perform that duty and (c) an injury resulting directly from that failure." (G.Br. 9, citing Hawaii cases).

With respect to any applicable aviation law, there is no Hawaii precedent which the federal courts are bound to follow. A federal court need not follow unreported decisions of state trial courts, *King v. Order of United Commercial Travellers of America*, 333 U.S. 153, particularly where federal law is involved, *Towner v. Commissioner of Internal Revenue*, 182 F. 2d 903, 907 (C.A. 2).

On the subject of causation, Plaintiffs also rely on *Mitchell v. Branch and Hardy*, 45 Haw. 128, but not on the dicta cited by the Government (G.Br. 10). The rule of law set forth by the Supreme Court of Hawaii in that case may be quoted as follows:

“One cannot excuse himself from liability arising from his own negligent conduct merely because the later negligence of another concurs to cause an injury, *if the later act was a legally foreseeable event.*” (Emphasis added) 45 Haw. at 138.

On the subject of the scope of review of a trial court’s determination of relative fault the *Mitchell* case, *supra*, is also pertinent.

“Where damages are apportioned—an appellate court should confine its inquiry solely to the question of whether, upon the evidence adduced and the trial court’s findings thereon, the apportionment of damages was so clearly erroneous as to shock the moral sense.” 45 Haw. at 142.

Actually there was no apportionment in the case at bar even though the Court below stated with respect to the two defendants “that each is equally liable, and that each should pay one half of the judgment” (D.

para. 42, R. 562). Apportionment is only appropriate where the degree of fault is disproportionate. See, Uniform Contribution Among Tortfeasors Act, Revised Laws of Hawaii, 1955, §246-11. In any event, the liability is still joint and several.

II. THE DISTRICT COURT DID NOT ERR IN FINDING THAT THE HONOLULU TOWER CONTROLLERS WERE NEGLIGENT IN THE PERFORMANCE OF THEIR DUTIES AT THE HONOLULU AIRPORT AT THE TIME OF THE ACCIDENT INVOLVED HEREIN.

With respect to the negligence of the Honolulu tower controllers, the basic issue is the scope of their duties to the Decedent at the time of and just prior to the accident which led to his death. There is no question but that a duty existed. Perhaps the best framework within which to view the situation would be to quote from this Court's decision in *United States v. Miller*, 303 F. 2d 703, 711 (C.A. 9), *cert. denied*, 371 U.S. 955:

“The optimum of safety is sought to be achieved by imposing concurrent duties on the pilots and tower personnel. In any given case, one, both, or neither could be guilty of a breach of the duties imposed. This view is implicit in the decision of the court in *Eastern Air Lines v. Union Trust Co.*, 95 U.S. App. D.C. 189, 221 F2d 62 affirmed sub nom, *United States v. Union Trust Co.*, 350 U.S. 907, 76 S. Ct. 192, 100 L.Ed. 796. The ultimate result reached in that case recognized that both the Government and the air-

line had concurrently breached their duties, and each was held liable.”²

Whether or not the action of the tower in any particular instance constitutes negligence is a question to be determined *by the trier of fact*. *United States v. Douglas Aircraft Co.*, 169 F. 2d 755 (C.A. 9).

There is some dispute about whether the takeoff clearance given to the Piper in this case was strictly “according to the book”, i.e., Air Traffic Control Procedures, ATM-2-A (GX-5). Although the tower controllers attempted to so represent, with no little confusion, (see, Tr. 1117, 1122, 1165, 1166, 1168), the Court below found that the Manual contained no minimum separation provisions for situations involving intersecting runways which were involved in this case, and went on to say that even if it could be so interpreted and that interpretation were followed, that would “not exonerate tower personnel from the the authority and duty to exercise good judgment where it was obviously required in the interests of safety.” (D. para. 66(o), R. 592, 593.) This was in effect admitted by the tower controllers (Tr. 1122, 1168).

²Perhaps it would be appropriate for this Court to take judicial notice of the following related statement recently made by Mr. Oswald Ryan, former chairman of the Civil Aeronautics Board:

“As a result of the fantastic speeds of aircraft today, the function of preventing midair collisions has been transferred for the most part from the pilot to the controller on the ground.”

Honolulu Star Bulletin, April 21, 1966, p. A-13.

In any event, it is clear in this case that the tower controllers considered it their *sole* obligation to follow the “letter” of the Manual (Tr. 985, 987, 1109-12) and the Court below so found that this was their (incorrect) position. (D. para. 41, R. 562; D. para. 68, R. 598).

On the other hand, they admitted that in issuing clearances under such circumstances their responsibilities included the exercise of judgment and discretion (Tr. 987, 996, 1122, 1168), yet they denied that any discretion was used in this instance other than to follow what they thought to be the letter of the Manual. (Tr. 985, 987).

Plaintiffs took (and now take) the position that the Manual in any event could not be relied upon to establish a standard of care and therefore objected to its being admitted in evidence for that purpose (Tr. 1079) based upon the following authority: 20 Am. Jur. *Evidence*, § 1045, p. 886. Cf. *Danbois v. New York Central RR.*, 12 N.Y. 2d 234, 189 N.E. 2d 468 (1963). Although this Court has referred to the Manual as the “bible for tower operators”, *United States v. Miller*, 303 F. 2d 703, 710 at n. 16 (C.A. 9), *cert. denied*, 371 U.S. 955, there is nothing in that decision which would intimate that it *limits* the responsibilities of the tower controllers or has the force and effect of law which the Court below in this case correctly concluded that it did not. (D. para. 58, R. 576.)

It is only the applicable Civil Air Regulations, 14 C.F.R. 1, et seq. (1961 Rev.), which are admissible as evidence of the proper standard of care and even

then, compliance therewith, if any, is only considered *evidence of due care*. 1 Kreindler, *Aviation Accident Law*, §§ 10.02 (3) (4) (6) (1963).

Moreover, regardless of whether the action of a control tower operator in any particular instance was customary, it still may very well constitute negligence. *United States v. Douglas Aircraft Co., supra*. See: *Yoffee v. Pennsylvania Power and Light Co.*, 385 Pa. 520, 123 A. 2d 636; *Seaboard Airlines R. Co. v. Pan Maryland*, 105 F. Supp. 958, 964 (D.C. Ga.) Compliance with a general practice does not excuse injurious conduct if it is not consistent with due care. Frumer and Biskind, *New York Law and Proof* §71.04 (7).

The evidence in the trial of this case very clearly demonstrated that the Manual was *not* the ultimate controlling document. The Government was required to produce many documents including revisions to ATM-2-A and Circulars issued to controllers containing admonitions regarding the dangers of wake turbulence and advising them of what they could and should do to aid in avoiding these hazards to aircraft. They are very thoroughly analyzed by the Court below in paragraphs 66(a) through 66(x) of its Decision (R. 582-596), and it would serve no purpose for Plaintiffs to attempt to elaborate on this analysis. In so doing, the Court adequately disposed of the Government's spurious contention that no definitive directive on the subject other than the Manual happened to be in effect at the time of the accident. (D. para. 66(1), R. 588-590.)

The District Court also made a thorough analysis of the statutes, regulations and directives involved (D. paras. 57-63, R. 575-581) and arrived at the reasoned conclusion that they also placed on the tower controllers a duty to exercise discretion and judgment in the interests of safety under such circumstances (D. para. 64, R. 581), confirmed by the analysis mentioned in the above paragraph.

With this background in mind, a brief review of the Chief Tower Controller Garcia's testimony will easily fortify the District Court's finding of negligence. He was questioned at length on his knowledge of the dangers of wake turbulence and was particularly vague as to his knowledge of the pertinent circulars of which he was responsible to be aware. (Tr. 992-994, 999-1020, 1027, 1028, 1072-1074, 1123, 1124, 1146.) He admitted that these circulars had an effect on or supplemented the procedures set forth in ATM-2-A (Tr. 1062-1063), and yet he stated that *at no time did he consider* instructing Humphreys (the "trainee" controller on the microphone) to hold the Piper for *any* period of time to avoid the turbulence hazard. (Tr. 1004.) The following portion of his testimony where he was being questioned regarding one of the aforementioned Circulars is most enlightening:

"Q. May I ask you, in reference to the fourth paragraph at the bottom of the first page, after a description of the hazards of thrust stream turbulence with other aircraft, it goes on to say,

'Under conditions of the type referred to above, and in any other condition where it is anticipated that turbulence could exist, it is prefer-

able that aircraft be delayed until it can be reasonably assumed that a hazardous situation no longer exists.'

Do you see that portion?

A. Yes, I see that portion.

Q. Now, in light of that, can you state whether or not you ever received any instruction which would indicate that you consider delaying aircraft to avoid this type of hazard?

A. No I don't recall that.

Q. Well, reading it now, do you understand that to be what it says?

A. Reading this now, it still doesn't change my way of thinking in reference to—it doesn't change my way of controlling traffic. I'd still control traffic by the Manual itself. And the Manual itself states that under the controller's judgment, if he thinks that the turbulence—or wake turbulence is in existence at that time, he shall issue it accordingly." (Tr. 1010-1011.)

He was unable to square these various admonitions with his prior testimony that he felt his sole responsibility was to issue a warning as indicated in ATM-2-A (Tr. 1020, 1028), in spite of the fact that he later admitted that these circulars were issued to "clarify, explain or further delineate" the procedures set forth in ATM-2-A (Tr. 1063).

Turning to the Government's specific contentions, it is difficult to follow the argument that the clearance given to the Piper could or should be interpreted as a conditional one, not to become effective until the pilot determined that the turbulence had subsided. (G.Br. 22-3.) A more rational interpretation would

be that it was a clearance for takeoff with a caution to anticipate the turbulence *while taking off*. The Piper had to either hold its position or take off. Once the clearance was issued, the latter was the only alternative, since otherwise there would have been no purpose in issuing the clearance. Moreover, according to Garcia *he saw the Piper commence its takeoff immediately after the clearance was issued* (Tr. 342, 343, 365), and this was confirmed by the ground controller Capellas (Tr. 95, 234). At that point Garcia, with his overriding microphone (Tr. 925-6, 1105), had a second opportunity to rectify Humphrey's original error by taking over and instructing the Piper to hold till the turbulence had subsided. It could almost be argued then that Garcia had the last opportunity to take preventive action, particularly in light of the unequivocal and uncontroverted testimony of Professor Lissaman who indicated that once the Piper commenced its takeoff there was no other alternative but a crash due to the intensity of the vortices and the structural and control limitations of the Piper. (See the District Court's analysis of the evidence at R. 561, para. 39, n. 6.) The simple fact remains that Mr. Garcia was not the *slightest bit concerned* as long as the warning had been issued. Such an attitude could best be characterized as an invitation to the pilot of the Piper to commit suicide "but don't say I didn't warn you!"

There was ample testimony to support a reasonable interpretation of the clearance given the Piper as one which contemplated that the Piper would thereupon

and without delay proceed to take off, which in fact it did with the full knowledge and lack of concern of Garcia, the chief controller. (See R. 591, para. 66(n), n. 10 of the District Court's Decision and the testimony of George R. Carter in that regard, Tr. 831, 832, 851, 852, 897, 908-912, 915-922.) In any event there was conflicting evidence on this issue from which the Court below found that such an interpretation of the clearance should have been anticipated by the tower controllers. (D. para. 40, R. 561; para. 68, R. 597-598.)

In this connection, footnote 12 of the Government's Brief (G.Br. 24, 25) contending that the Court below recognized that a clearance is "a mere authorization and not a command" (R. 597) is misleading. The point the Court was making was that whether or not this is so, many pilots are unaware of it in any event and this is something of which the controllers should have been cognizant. None of the cases cited in support of the Government's contention that a takeoff clearance is permissive in nature had to do with takeoff clearances. They all involved *landing* clearances and merely illustrate the thesis set forth in the Flight Information Manual (GX-6) that the issuance of a clearance, such as "cleared to land", does not relieve the pilot from exercising a reasonable degree of caution in executing the provisions of the clearance. *New York Airways Inc. v. United States*, 283 F. 2d 496 n. 12 (C.A. 2). The court there pointed out that this language is addressed to collisions between aircraft. (283 F. 2d at 499.) But in a takeoff situation,

such as involved herein, what opportunity could there be for the pilot to exercise caution other than not to go at all, and then what would be the point in issuing the clearance in the first place? Implicit in a clearance is the representation that it is safe to *proceed* in accordance therewith, i.e., in this case with caution. In this connection see the meaning of "cleared to land" in *United States v. Union Trust Co.*, 221 F. 2d 62 (C.A. D.C.).

As Justice Jackson said in a concurring opinion in discussing the role of the Federal Government in the control of air commerce:

" The moment a ship taxis onto a runway, it is caught up in an elaborate and detailed system of controls. *It takes off only by instruction from the control tower, . . .*" (emphasis added). *Northwest Airlines v. State of Minnesota*, 322 U.S. 292, 303.

The argument appearing at pages 25 and 26 of the Government's brief is not persuasive of the above issue. There was conflicting evidence on the subject and therefore the findings of the Court below in this regard must stand. (See: G.Br. 26-27, n. 14 and R. 591, D. para. 66(n), n. 10). *United States v. Douglas Aircraft Co.*, 169 F. 2d 755 (C.A. 9); *Mitchell v. Branch and Hardy*, 45 Haw. 128, 139.

The Government argues that the courts have consistently held that "the direct and primary responsibility for the safe operation of an aircraft rests, not with the controllers, but with the aircraft pilot", citing authorities. (G.Br. 27.) It is generally found to be un-

profitable to compare cases. Nevertheless the Court below in its Decision ably distinguishes *United States v. Miller*, 303 F. 2d 703 (C.A. 9) *cert. denied*, 371 U.S. 955. (D. para. 48, R. 566-567.) *United States v. Schultetus*, 277 F. 2d 322 (C.A. 5), *cert. denied*, 364 U.S. 828, (D. para. 49, R. 567-570), and *Smerdon v. United States*, 135 F. Supp. 929 (D. Mass.) (D. para. 45, R. 563-5). The latter case is the only one which was not decided on the basis of contributory negligence. *Wenninger v. United States*, 234 F. Supp. 499 (D. Del.), *affd. w/o opinion* 352 F. 2d 523 (C.A. 3), also went down on the issue of contributory negligence and a finding that the negligence of the Government agents in failing to warn was not a proximate cause of the accident.

Although the *ultimate* responsibility for the safe operation of the aircraft may very well lie with the pilot in command, this in no way should be permitted to relieve the controllers of their responsibilities. This is the reverse of the situation in *Miller, supra*, where this Court stated in essence that the trial Court may have felt the primary responsibility was that of the tower controller which might relieve the pilot of his otherwise responsibility. (303 F. 2d at 709, 710.) As was pointed out earlier in the quotation from that opinion, the duties of the pilots and controllers overlap. Even if we should concede that in any particular situation the primary responsibility was that of the pilot in command, conversely *this would not relieve the tower controllers of their otherwise responsibility*. If such were the case, the Su-

preme Court would never have upheld the liability of the Government in *United States v. Union Trust Co.*, 350 U.S. 907. Although this Court never reached the issue of the negligence of the tower controllers in *Miller, supra*, it did discuss the duties of the controllers under the Manual in the circumstances of that case and indicated they were affirmative duties. (303 F. 2d at 710.) Although it is perhaps inappropriate to speculate, a reasonable conclusion to be drawn from the language of that decision is that if Miller had had a passenger along whose estate had brought suit, the Government might very properly have been held a joint tortfeasor as here.

Although the case also was ultimately decided on the question of contributory negligence, Plaintiffs herein and the Court below relied upon *Johnson v. United States*, 183 F. Supp. 489 (E.D. Mich.), *affd.* 295 F. 2d 509 (C.A. 5) to the effect that

“The fact that variables prevent the fixing of limits with certainty does not absolve the control tower from a duty to take the turbulence hazard into consideration, but this is merely one factor that may be considered in determining whether under a given set of facts the employees of the control tower did meet the standard of reasonable care.” 183 F. Supp. at 492.

and that:

“In any event, the safety of those using air lanes is not to be sacrificed to traffic expediency.” 183 F. Supp. at 493.

(D. para. 52, R. 573.)

The only other case nearly in point is the recent decision in *Hartz v. United States*, 249 F. Supp. 119 (N.D. Ga.) which the Government acknowledges is pending on appeal. (G.Br. 24, n. 11.) As the Court below suggests in its analysis of *United States v. Schultetus*, 277 F. 2d 322 (C.A. 5), *cert. denied*, 364 U.S. 828, the real basis of the decision would seem to be the (primary) negligence of the pilot and not the lack of negligence on the part of the tower controllers. (D. para. 49, R. 567-70.) The Georgia District Court in reliance on the broad principle that Government regulations have the force and effect of law stated that a violation of ATM-2-A must be shown. 249 F. Supp. at 123. There are three basic fallacies to this pronouncement as pointed out earlier:

1. ATM-2-A is *not* a regulation having the force and effect of law (D. para. 58, R. 576); 1 Kreindler, *Aviation Accident Law*, §§ 10.02 (3), (4) (1963).

2. A limited standard of care cannot be established by the adoption of an operations manual. 20 Am. Jur., *Evidence*, Sec. 1045, p. 886. *Cf.*, *Danbois v. New York Central RR*, 12 N.Y. 2d 234, 189 N.E. 2d 468.

3. The Georgia District Court was apparently unaware of all the changes, bulletins and circulars which had the effect of modifying or supplementing the provisions of ATM-2-A. This cannot be determined conclusively from a reading of the decision but may be fairly presumed since the Court made no mention whatsoever of anything other than the

Manual in discussing the standards of care of the tower controllers—not even the subjective knowledge or standards of the controllers themselves.³

For the foregoing reasons it cannot be said that *Hartz* should be given the same consideration as the better reasoned decision of the Court below in this case.

III. THE DISTRICT COURT DID NOT ERR IN HOLDING THE DEFENDANT BAKER LIABLE FOR (A) THE NEGLIGENCE OF ITS INSTRUCTOR SHIMA (B) ITS OWN NEGLIGENCE IN FAILING TO FURNISH TO THE DECEDENT AN ADEQUATELY INFORMED AND TRAINED INSTRUCTOR PILOT IN SHIMA.

At the outset it should be pointed out that most of the Government's arguments attempting to absolve the tower operators in this instance have the net effect of pointing the finger at Baker's instructor Shima who was indisputably the "pilot in command" of the Piper and as such was "directly responsible for its operation and (had) final authority as to operation of the aircraft." (14 C.F.R. 60.2.)

Here we have a mixed question of law and fact. Clearly the regulation which has the force and effect of law places the responsibility directly on the instructor pilot in command. *Lange v. Nelson-Ryan Flight Service Inc.*, 259 Minn. 152, 108 N.W. 2d 428,

³A reading of the plaintiffs' trial brief in that case would seem to indicate that they relied on the Manual as the sole controlling authority. Therefore there was no such issue for that Court to decide.

cert. denied 371 U.S. 953. This is really a question of interpretation of Federal law.

There was also substantial evidence and testimony on the subject by the various experts, including Baker's then managing agent in Honolulu as well as a Government Inspector, both of whom concluded as a matter of *fact* that under the circumstances of this case the instructor was the pilot in command who was *fully responsible* for the operation of the aircraft.⁴ Thus the Court below made such a finding of fact which is supported by the overwhelming weight of the evidence. (D. para. 37, R. 559.)

⁴The Pilot Operators Aircraft Accident Report (P.X. 7) contained the following information:

"2. Pilot at the Controls: Charles I. Shima"

This was prepared by Baker's then manager in charge of Honolulu operations George R. Carter. This exhibit was offered into evidence among other things as an admission against interest of Baker's managing agent Carter. (Tr. 805-13.) *Pekelis v. Trans-Continental Western Air*, 187 F. 2d 122 (C.A. 2); *Hickman v. Taylor*, 329 U.S. 495. No issue has been made on this appeal regarding any error in as to its admission. See: Rule 18, 2 (d) of the rules of this Court and Baker's Specifications of Error. (B.Br. 13, 14.)

Furthermore Mr. Carter confirmed this conclusion in his testimony where he said "the instructor would normally be the pilot in command" (Tr. 815) and would be monitoring the controls (Tr. 816, 825, 826).

Joe E. Brandt, the chief investigator of this accident for the F.A.A., testified that "The pilot in command would be the instructor since he actually was the only man qualified in the aircraft." (Tr. 1182.)

Emmet James Kay, Sr., who was called as an expert instructor pilot testified that when a student is flying with an instructor, the instructor is the pilot in command and responsible at all times; that the decision to take off at any time (such as in the situation involved in the accident) would be that of the instructor; that the instructor pilot in command is responsible for the acceptance of any clearance both according to the regulations (Tr. 601) and in accordance with general flying school practice (Tr. 603).

There is thus little profit in a discussion of the evidence and inferences to be drawn therefrom pro and con as attempted by Baker. (B.Br. 17, 19-20.) As mentioned earlier, this is an appeal and not a trial de novo on the record, and the findings of the trial Court must stand unless found to be "clearly erroneous" under Rule 52(a) Federal Rules of Civil Procedure.

The cases cited by Baker (B.Br. 18) are inapposite as they deal with situations where the *cause* of the accident was *unknown*. In this case, the cause was clearly established and is not now at issue, being expressly conceded by Baker in its statement "This finding is not disputed by Appellant Baker." (B.Br. 4.) This alone distinguishes the case at bar from those such as *Hall v. Payne*, 189 Va. 140, 52 S.E. 2d 76, and the *unreported oral ruling* in *Haddon v. Atkinson*, Civil No. 1023, Circuit Court, Third Circuit, State of Hawaii. This latter case is not controlling for at least three distinct reasons:

1. There again the cause of the crash was unknown. "Obviously, the state court decisions would not be controlling in the federal court in such a case unless the evidence was substantially similar." I A Moore's Federal Practice (2d ed.) Para. 0.307 (2), p. 3305, n. 10.

2. A question of interpretation of Federal law is involved, i.e., 14 C.F.R. Sec. 60.2, *Authority of the pilot*. *Towner v. Commissioner of Internal Revenue*, 182 F. 2d 903, 907 (C.A. 2).

3. In any event, the Federal Court need not follow an unreported (oral) decision of a state trial Court which under state practice does not constitute a precedent in that or any other Court of the state. *King v. Order of United Commercial Travellers of America*, 333 U.S. 153.

It should be noted at this juncture, that Baker nowhere seems to acknowledge the *finding* of the Court below that Shima was in fact negligent. On the other hand, it complains in its brief that such was the *only* issue tried with respect to Baker (B.Br. 21-22), and therefore it was improper for the Court below to have found against Baker on a separate theory of liability. In Plaintiff's Statement of the Case earlier, it was clearly demonstrated at the hearings on the motions for new trials that the District Court *had* found that Shima was negligent. (Tr. 15, October 1, 1965.) This would appear to put Baker on the horns of a dilemma. If it argues too vehemently against the Court's primary thesis (the failure of Baker to have furnished to the Decedent an adequately informed and trained instructor pilot in Shima) as not being an issue fully and fairly tried, then it may find itself faced with the negligence of Shima alone as a basis of its liability which the Government has argued was a superseding and thus the sole proximate cause of the accident. (G.Br. 11-21.) Such an argument by Baker could lead to its being held solely liable for the accident, whereas the theory of the Court below makes Baker's individual negligence a continuing breach of its duty to the Decedent and not the last

act of negligence. (D. para. 55, R. 574.) But see the argument on proximate cause, *infra*.

Actually there is no inconsistency whatsoever between the two separate theories of Baker's negligence. One is based upon a direct duty and a high standard of care of the flying school owed to its students and the other is based upon *respondeat superior* for the negligence of the instructor Shima. In the latter case, ordinary negligence on the part of Shima would be sufficient to hold Baker liable but in the former case only slight negligence would be required.

The Court below, in line with the authorities, found that Baker owed to the Decedent the highest degree of care similar to that of a carrier. (D. paras. 36, 55, 68, R. 558, 574, 598.) *Kasanof v. Embry-Riddle Co.*, 157 Fla. 677, 26 So. 2d 889; *Linam v. Murphy*, 360 Mo. 1140, 232 S.W. 2d 937. The student is entitled to place implicit reliance upon the instructor's superior knowledge, flying experience, and prudence in all matters concerning the training. *Weadock v. Eagle Indemnity Co.* (La. App. 1943), 15 So. 2d 132. See, *Annotation*: 17 A.L.R. 2d 557. As mentioned earlier, these authorities were presented to the Court and counsel well in advance of trial by way of a Trial Memorandum filed February 28, 1964. Thus the standard of care of Baker through the quality of its flying instructor Shima was considered at issue. Actually it is difficult to see how the two theories can be extricated one from the other. It is conceivable that had Shima been held only slightly negligent, then Baker could have been held directly liable and

not vicariously so. But this is dealing in sophistry and is not in accord with the evidence.

The fact that Plaintiffs out of an abundance of caution amended their complaint and the pre-trial order accordingly (with leave of Court) in order to add the specific words of the District Court's theory of negligence of Baker should in no way be construed as an admission that such issue was not fully tried.

The allowance of the amendment came squarely within the provisions of Rule 15(b), Federal Rules of Civil Procedure.

“(b) *Amendments to Conform to the Evidence.*

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to amend does not affect the trial of these issues. . . .”

Baker acknowledges that the issue of Shima's level of training was in fact raised through the testimony of Emmet Kay, the instructor from whom Shima had received his training. (Tr. 590-592, 600, 626, B.Br. 26.) But Baker fails to note that Joseph Eshelman Jones, another expert on flying instruction, also testified regarding the general standards in the community regarding the instruction of instructor pilots (Tr. 1330-1331, 1343-1346) and in particular on the subject of wake turbulence and the handling of aircraft in

such situations. (Tr. 1332-1333.) Mr. Jones was thoroughly cross examined on these standards of training of instructors by Baker's counsel. (Tr. 1351-1354.)

Baker relies on Rule 16, Federal Rules of Civil Procedure, in support of its thesis that nothing outside the pre-trial order should have been considered at issue. If this were true, it would render Rule 15(b), *supra*, nugatory.

Moreover, according to the local practice generated in some degree by skepticism among the members of the local bar, the Pre-trial Order in this case was not made quite as broad as indicated by Rule 16, *supra*, but rather contained the following final order endorsed thereon:

“It is Hereby Ordered that the foregoing constitutes the Pre-trial Order in the above-entitled case; that it shall supplement the pleadings herein and govern the course of the trial of this cause, unless modified to prevent injustice.” (R. 380.)

Certainly if Rule 15(b) calls for liberality in amendments to the pleadings even after trial it follows that Rule 16 must be equally as liberal. The Court below properly granted the Motion to Amend the Complaint (R. 648, 649) and the Pre-trial Order accordingly (R. 625, 626).

IV. THE DISTRICT COURT DID NOT ERR IN FINDING THAT THE DECEDENT ROBERT FURUMIZO WAS NOT CONTRIBUTORILY NEGLIGENT AND DID NOT ASSUME THE RISK WHICH LED TO THE CRASH.

It should be noted at the outset that this issue was raised and is here contended by the defendant Baker *only*. The Government at no time has suggested that these defenses might be available against the Plaintiffs; as a matter of fact the Government's strongest point is the contention that the negligence of Baker's instructor Shima was the *primary* negligence which led to the crash, since he had the direct or primary responsibility for the operation of the Piper. (G.Br. 13-19, 27-30.)

Baker again overlooks the basic principle set forth in *Lange v. Nelson-Ryan Flight Service, Inc.*, 259 Minn. 460 (1961), 108 N.W. 2d 428, *cert. denied*, 371 U.S. 953, that the flight instructor as "pilot in command" of the aircraft is responsible for the operation and safety of the flight, 14 C.F.R. 60.2; and through him the flying school owes the student the duty of care of a carrier to a passenger. Thus, *as a matter of law*, the student pilot on a training flight does not assume risks of an extraordinary character, nor those arising from the instructor's own negligence (any more than a passenger aboard an airliner). *Weadock v. Eagle Indemnity Co.* (La. App.), 15 So. 2d 132; *Lange v. Nelson-Ryan Flight Service, Inc.*, 263 Minn. 152, 116 N.W. 2d 266 (same case as above), *cert. denied*, 371 U.S. 953; *Plewes v. City of Lancaster*, 3 Avi. 17,286 (Pa. Com. Pls., 1950).

Baker also fruitlessly indulges in rearguing the evidence relating to the subject (B.Br. 27). The Court below analyzed *all* of the evidence and came to the ultimate finding that “37. Furumizo was not negligent in any manner in this respect, since his instructor was in charge of the plane, and at takeoff especially would be the one to exercise judgment in accepting clearance from the tower.”⁵ See also the testimony of George R. Carter in this regard (Tr. 856-858, 867, 901) and the general discussion of the law and the facts on the subject of the “pilot in command” in Paragraph III, above.

Since the District Court made a detailed analysis of the evidence before arriving at its ultimate finding of fact in this respect, we are once more faced with the conclusion that appellee Baker has utterly failed to show that such a finding was “clearly erroneous”

⁵“There is no direct evidence that decedent had actually been instructed adequately or at all on the dangers of large plane wake vortices or turbulence, although there is some weak evidence from which an inference was attempted to be drawn by the defendants to the effect that he must have received some instruction on such matters. For example, one of his former instructors testified that it was customary for him to give certain instruction on wake turbulence to his students at a particular state during the ten hours and forty minutes of flying instruction that Furumizo was shown to have had and there is evidence that various information bulletins customarily mailed to all pilots and flying schools, etc., were posted on the bulletin board and presumably read by all, including students like Furumizo. However, the Court finds such alleged evidence insufficient to establish by a preponderance of the evidence, or at all, that Furumizo actually had been instructed on the dangers of wake turbulence and therefore knew or should have known about it. The Court therefore rejects any theory of contributory negligence or alleged assumption of risk based on any alleged knowledge or presumption of knowledge on the part of Furumizo concerning the dangers of wake turbulence.” (R. 559, 561; Tr. 596-600, 632.)

within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

Thus we have a rule of law fortified by findings of ultimate fact that the Decedent could not be and was not in fact under the circumstances contributorily negligent nor could he or did he assume any risk which led to his demise.

V. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE NEGLIGENCE OF BOTH DEFENDANTS OR THEIR EMPLOYEES CONCURRED IN OR PROXIMATELY CAUSED OR CONTRIBUTED TO THE ACCIDENT.

The issue of causation appears to be the one where there is so much divergence in the views of the Court below and the Appellants. Here, too, Plaintiffs for the first time do not agree completely with the views of the Court set forth in its Decision.

The Court stressed its finding of "negligence of defendant Baker in not furnishing in Shima an adequately informed and trained pilot" (D. para. 42, R. 562; D. paras. 36, 55 and 68, R. 558, 574, 598).

The crux of that finding as it pertains to causation is found in the following portion of the Decision:

"38. This negligence of Baker, since it antedated the actual takeoff of the Piper was not the sole and last independent cause of the accident, but continued as a contributing cause from before the accident until it happened." (R. 560.)

This theory of Baker's negligence therefore completely frustrates the contention of the Government that it was the negligence of Shima alone which was latest in point of time and was therefore the *sole* proximate cause of the accident (G.Br. 11-12, 20-21). Thus the Government stresses the negligence of Shima (G.Br. 12-19) and disregards the Court's finding of the continuing negligence of Baker by way of the breach of its direct duty to the Decedent which a flying school owes to its student.

In this regard there is no question from a reading of the Decision as a whole that Shima was found to be negligent, and this was later confirmed by the Court below (Tr. 15, October 1, 1965). The only question is how this affects the negligence of the employees of the Government in point of time and in relation to causation.

On the other hand, Baker totally ignores the negligence of Shima and complains that the Court's finding as to the direct negligence of Baker in not furnishing in Shima an adequately informed and trained instructor pilot was a question which was not fully and fairly tried on the issues joined below. (B.Br. 20-26).

It is submitted that the end result should be the same whether we view Baker's liability as vicarious through the negligence of Shima or direct through its failure to provide an adequately informed and trained instructor. In the latter situation, there is no problem with the aspect of concurrent causes. But the Government contends that in the former situation Shima's negligence should be considered an intervening cause

since it should not have been anticipated or was *not reasonably foreseeable* (G.Br. 20-21), citing *Mitchell v. Branch and Hardy*, 45 Haw. 128. The rule of law is correct but its application to the facts of this case by the Government truly misses the mark in the following statements:

“The Honolulu controllers had no reason to believe that Mr. Shima would ignore the warning given him and take off immediately.” (G.Br. 20) and

“Clearly, Shima’s reckless action could not have been foreseen.” (G.Br. 21.)

The two foregoing arguments in support of the Government’s thesis regarding causation completely overlook the fact that the controllers actually stood there and watched the Piper take off immediately after the clearance was issued, did nothing to prevent it and expressed no concern or alarm over the fact whatsoever! (Tr. 95, 234, 342, 343, 365). It could well be argued that if such action by Shima were considered so reckless, the tower controllers had a duty to admonish him as soon as they observed the Piper commence its takeoff roll. A reading of their entire testimony would indicate that they were totally unconcerned over the situation. This is one of the things which impressed the Court below so unfavorably. (D. paras. 40, 41, R. 562-563.)

Thus it is clear from the uncontroverted testimony of the tower controllers themselves that not only did they in fact foresee that Shima would take off immediately but they actually *stood by and watched him do so!*

Under such a state of the record, there could be no alternative but to conclude that the test of *Mitchell v. Branch and Hardy*, 45 Haw. 128, is fully met and the issue of intervening cause is factually non-existent. This also renders moot the objection of Baker to the alternate (primary) finding of the Court below of Baker's direct negligence. Thus the Judgment can and should be allowed to stand based on the negligence of the tower controllers and Shima individually for which the two Defendants are jointly liable.

VI. THE DAMAGES AWARDED BY THE DISTRICT COURT WERE NOT ERRONEOUS OR EXCESSIVE. (Baker's Specifications of Error Nos. 7 and 8.)

(a) After summarizing briefly the evidence of the Decedent's remarkable work record the Court below stated:

" Any prognosis for the future is conjectural to a certain extent, but this Court holds that the evidence, as clearly as it is possible to demonstrate, justifies a finding that Robert Furumizo would have been promoted to GS-9 by September 1, 1963, would have achieved or would achieve the successive steps of base salary in that grade at least as early as the dates indicated on Exhibit B-6-4 and would be promoted within a reasonable time to GS-11. The testimony of the witness Wong indicates that a man of decedent's high ability, qualification and drive could normally expect to be promoted to GS-11 in from three to six years, with certain contingencies, such as transferring to a different branch and availability

of open positions. *To be conservative*, this Court finds that *with reasonable certainty* he would have achieved the equivalent of GS-11 in base salary *in not more than ten years* after his promotion to GS-9" (emphasis added) (D. para. 70(c), R. 600, 601).

Even a reading of Baker's citations to the record on this issue (B.Br. 28-30) makes it clear that the Court below was justified in making its findings based upon "reasonable certainty" as Baker contends is the criterion set down in *Condron v. Harl*, 46 Haw. 66. It would therefore serve no purpose to quote from the testimony any further as Baker has failed to even hint that the Court's finding in this regard was "clearly erroneous".

No such concession was made by Plaintiffs' counsel. In Plaintiffs' reply brief on damages the following was stated in answer to Baker's similar position below:

"The record should be set straight on the subject of Plaintiffs' contentions regarding the use of the GS-11 pay scale in calculating the damages. Plaintiffs' failure to make any such *strong* contention in its Opening Brief was based upon the problem of 'reasonable certainty' and the fact that such a promotion of the Decedent would hinge on the existence of vacancies in his field. Nevertheless, Mr. Wong testified unequivocally that in his opinion the Decedent would have ultimately reached the level of GS-11 and that the average period of time for a person in that field to reach this level was 3-6 years. Thus, taken together with the other evidence, at the very outside

it could be argued that a calculation should be based on the GS-11 pay scale beginning September, 1969 (6 years after the promotion to GS-9). It is interesting to note that our Supreme Court, in testing the validity (excessiveness) of a verdict in a death case in *Ginoza v. Takai Electric Co.*, 40 Haw. 691, 707, based its analysis on an acceptance of the following evidence of a like nature:

“ “. . . evidence establishes that the decedent . . . had received two salary increases during the year of employment immediately prior to his death; and that in a period from 3 to 6 years thereafter he would probably have developed into a first-class mechanic at a salary of approximately \$300.00 per month; . . . ” (Emphasis added; R. 499-500.)

It should be noted that *Condron v. Harl*, *supra*, 46 Haw. 66 was not a death case but *Ginoza*, *supra*, was. The distinction is noted in *Spangler v. Helm's New York-Pittsburgh Motor Express* (Pa.), 153 A. 2d 490, 492:

“ . . . Difficulty of computation is not a barrier to full recovery. The commission of a wrong carries with it the duty to make amends. And if the mending process is additionally expensive because of problems encountered in ascertaining the cost of the rehabilitating agents, that process becomes part of the obligation the tortfeasor must assume.”

More appropriate than *Condron v. Harl*, *supra*, is *Rohlfing v. Moses Akiona Ltd.*, 45 Haw. 373, which sustained a cause of action by the estate of a four year old who died by drowning. In that case the

Supreme Court of Hawaii discussed the necessity of the trier of fact indulging in certain assumptions in death cases. (45 Haw. at 393.)

One of the assumptions in which the Court below indulged to the prejudice of the Plaintiffs was that by the time the Decedent had achieved GS-11, the cost of living allowance (COLA) would have been eliminated. Thus the computations were actually based on the figures in evidence covering a GS-9 *with* COLA as being substantially the same as a GS-11 without COLA. (D. paras. 70(d)(e), R. 601, 602.)

How can it be said, upon all the evidence that either such finding could be deemed “clearly erroneous”.

(b) Baker’s cryptic comment (B.Br. 30, last par.) regarding the Court’s failure to apply the 1.15865 factor to the deductions for pension contributions and income taxes in order to make up for the discount for the period from the date of death, June 20, 1960, to the date of the decision, June 20, 1965, is not intelligible as such to this writer. Specific references to the portions of the decision being attacked, as well as the record, are necessary in order to clarify this point. Until then it cannot be fairly answered. (There will be more discussion, *infra*, however, on the propriety of the use of such a computation at all since it eliminates pre-judgment interest and deals with improper discounting for income taxes.)

(c) Once more with respect to the point made in the first paragraph on page 31 of Baker’s Brief, it cannot be intelligibly approached without specific

reference to the portion or portions of the Decision being attacked or the evidence upon which Baker relies in support of its position. The Court did state:

“ The evidence seems to this Court a bit ambiguous as to whether the 35% testified to by Mrs. Furumizo as being the proportion of income spent by decedent on himself, included retirement system contributions. *This Court gives the benefit of the doubt to the defendants on this item.*” (Emphasis added); (D. par. 70(k), R. 605.)

(d) With respect to Baker’s final point contending that \$15,000 general damages to the estate is excessive (B.Br. 31, 32), as is often stated, “verdict” comparisons are unrewarding. The issue of damages for pain and suffering incident to death when the period is a short one and proof is difficult was discussed in *Rohlfing v. Moses Akiona Ltd.*, *supra*, 45 Haw. 373, 396-398. There the Supreme Court of Hawaii rejected as a matter of law any such theory as instantaneous death and held that in all such cases this involved a question to be determined by the trier of fact stating:

“ How much evidence is required and how much may be left to conjecture we prefer not to say at this state of the case.” 45 Haw. at 397.

In such cases the consciousness of approaching death is a proper element to be considered in evaluating mental suffering. *Watson v. Augusta Brewing Co.* (Ga.), 52 N.E. 152; *Elliot v. Arrowsmith* (Wash.), 272 Pac. 32; *Jenkins v. Hennigan, et al.* (Tex. Civ. App.), 298 S.W. 2d 905. Cf., *Gallagher v. U.A.L.*,

C.C.H. 3 Avi. 17,725 (D.C.E.D. Pa. 1951), 1951 U.S. Av. R. 514.

In *Meehan v. Cent. R.R. Co. of N.J.*, 181 F. Supp. 594 (S.D.N.Y.), the decedent died from drowning when a train in which he was a passenger passed through the opening of a drawbridge and into the water below. After reviewing the facts of the case the Court stated:

“Under these circumstances this Court is unable to say that the decedent endured no pain and suffering. It is true that this cause of action must be sustained, if at all, on circumstantial evidence. However, circumstantial evidence cannot be disregarded.”

Other drowning cases are *Kimmel v. Solow* (Super. Ct.), 199 N.Y.S. 2d 375 and *McCauley v. State*, 9 App. Div. 2d 488, 195 N.Y.S. 2d 253. Also in *Hickman v. Taylor*, 75 F. Supp. 528 (E.D. Pa.), an award was made to the estate of a seaman who died when a tug on which he was working sank. He was found in his underwear and the Court *presumed he was asleep* when the tug sank, yet an award was made for pain and suffering.

In the case of Robert Furumizo, the circumstantial evidence is strong. First there was the brief period when the airplane became out of control and fell to the ground. (Tr. 95.) During this time there was obviously a fear of impending death. Thereafter the evidence indicates that contact with the ground was not severe but rather the aircraft just collapsed “like

a wet towel." (Tr. 101.) Moreover the evidence further indicates that fire commenced immediately (Tr. 95, 979) and the exit doors to the aircraft were blocked (Tr. 798). The instructor, Shima, appeared to be making an attempt to extricate himself from the wreckage (Tr. 801) and the Decedent was apparently shielding his face from the fire with his right arm in front of his face "as if he was anticipating something" (Tr. 800). Undoubtedly for a period of time, however brief, there must have been the sheer horror and excruciating pain of being burned up in a funeral pyre.

As previously stated, verdict comparing is an unrewarding task. In one recent case the Supreme Court of Florida held that a verdict of \$99,500 for pain and suffering prior to death from burns was not so shockingly excessive as to warrant judicial interference. *Florida East Coast Ry. Co. v. Stewart* (Fla. App.), 140 So. 2d 880. Admittedly in that case the decedent lived for eight days. In *Dellaripa v. N.Y., N.H. & H.R. Co.*, 257 F. 2d 733 (C.A. 2) the Second Circuit held that the trial judge had not abused his discretion in denying a new trial because a jury awarded \$22,500 for pain and suffering where the decedent expired on the same day as the accident. The Court of Appeals expressed some doubt as to its power to review the trial judge's exercise of discretion in this particular.

It should also be noted that the Court below, in justifying the \$15,000 award, properly took into consideration the decreased value of the dollar in its

comparison of this with earlier awards made in similar cases of sudden death. (D. para. 71(a), R. 606.)

VII. THE COURT BELOW ERRED IN FAILING TO AWARD ADEQUATE DAMAGES IN CERTAIN SPECIFIED AREAS. (Plaintiffs', Cross-Appellants' Specifications of Error Numbered 1 through 6, supra at pages 5 and 6.)

a. Scope of Review on Cross-Appeal.

This is a limited cross-appeal relating only to the question of damages wherein Plaintiffs, Cross-Appellants contend that the Court below erred in certain of its calculations pertaining to special damages and considerations pertaining to general damages. Vol. 3A Barron and Holtzoff, Federal Practice and Procedure, §1552, pp. 59-60.

In view of the fact that the computations are complex and some of the considerations are subjective no request is being made to this Court for additur. 5 Am. Jur. 2d, *Appeal and Error*, §946, p. 374. Rather, a remand is being sought with directions to the Court below to reassess the damages in light of the errors specified upon this cross-appeal.

b. The Court Below Erred in Failing to Adjust the Special Damages to Compensate for the Decrease in the Value of the Dollar Throughout the Period of the Decedent's Life Expectancy. (D. para. 70(g), R. 602.)

As mentioned above, the trial judge in several instances took judicial notice of the decreasing value of the dollar in relation to a comparison of earlier

awards (D. paras. 71(a), (c), R. 606, 608), and even during the *five year period* between the date of death and the filing of the decision (D. para. 71(d), R. 609). And yet with the established trend from the evidence and in the law, the value of the dollar was frozen as of the latter date by the Court.

Based upon numerous authorities including the unequivocal statement in 25 C.J.S. *Death*, §100 at p. 1242, that, "Damages should be increased in proportion to the diminishing purchasing power of the dollar", taken together with the testimony of Myles Grover (the actuary called by the Plaintiffs) relating to Chart II, GS. F.P.M. Supp. 992 (Exhibit P-44), there is both a testimonial basis in the record as well as a legal basis for taking into account the future anticipated decreasing value of the dollar resulting in necessary increases in salaries.⁶

⁶The following is quoted from page 10, lines 8 through 16 of the deposition of Myles Grover, Exhibit P-51:

"Q. If you were attempting to obtain the present value of future anticipated earnings of a person in either one of these pay scales, in order to assure sufficient money in the future to replace such income, what factors would you consider appropriate to take into consideration?

A. I would take into consideration a rate of interest, which I have already quoted, and a life expectancy, which I have already mentioned, *and I would reflect to some extent the expected, or the long range increase trend in wages.*" (Emphasis added.)

With respect to the legal basis for this proposition the following pertinent quotes are made from Annotation: 12 A.L.R. 2d 611—Changes in Cost of Living or in Purchasing Power of Money as Affecting Damages for Personal Injuries or Death:

"Change in cost of living or in purchasing power of money is sufficiently a matter of common knowledge that even the jury, or the court when fixing damages, may take it into

In addition there is a factual basis. The history of the Federal Pay Scales from 1923 through 1964 (at the time of trial) appearing in Exhibit P-44, reflect that the increase over the past 40 years approximates 3.3 per cent per year on a straight line basis. The rate of increase from 1945 through 1964 is almost 5 per cent per year. It should be noted that the 3.3 per cent rate incorporates a period of economic depression in the early 1930's which should refute any contention that such a thing as deflation should ever occur in the economy of the United States. This projected 3.3 per cent annual rate of increase has substantial support in the authorities including current history to the date of this writing all of which it is felt can be judicially noticed.⁷

account in actions of damage for death also without evidence being submitted." at p. 644.

* * * * *

". . . counsel may show (the) court the approximate percentage of change that has occurred in recent years as a basis for its judicial notice." at p. 645.

* * * * *

"Section 15, Probabilities of Future Change.

"It has been held that the court may take into account future prospects of inflation or deflation in fixing damages for personal injuries (cit.)" at p. 646.

* * * * *

"... the decreased purchasing power of the American dollar, with little or no prospect for any change, *except probably further decrease for many years*, is a pertinent factor to be taken into consideration in determining the award . . ." (Emphasis added.) *Weadock v. Eagle Indemnity Co.* (La. App.), 15 So. 2d 132.

⁷The Federal Salary Reform Acts of 1962 and January 1964 were brought to the Court's attention during trial and form part of the basis for 3.3 per cent per year increase.

Coincidentally, in the spring of 1964 the Administration laid down a wage boost guideline of 3.2 per cent whereas the unions

It is no answer to contend in reply that payment is being made today in today's dollars. The devalued dollar of future years cannot be rejuvenated by taking the present value of such dollars and investing them at $3\frac{3}{4}\%$ interest to provide those dollars required in the future. We still end up with the same dollar which we know is going to be worth less than it is today.

With respect to a method of compensating for such a factor a system of computation and the actual computations have been provided to the Court below (R. 507, 508, 514-516).

had taken the position of demanding at least a 4.9 per cent wage hike in 1964. *Time*, April 3, 1964, p. 24. This was carried out in the Federal Salary Reform Act of July 1964 (after trial) averaging an approximate 3.2 per cent increase in G. S. pay scales. This was followed by the Federal Salary Reform Act of 1965 averaging a 3.6 per cent increase. (In the meantime the Federal Judiciary received a substantial increase in salaries to make up for the extensive period the rates had remained the same.) Just recently legislation was introduced and passed the U.S. Senate granting Federal pay increases plus fringe benefits "... close to (President) Johnson's 3.2 per cent wage guidelines." (Washington UPI.) The Honolulu Advertiser, July 12, 1966.

See Labor Cost Trends, Economic Report of the President, January 1966 pp. 76-79, and in particular chart 10 on page 77. President Johnson and economic adviser Heller have suggested wage guideposts:

"The average money-wage increase is to be no higher than the average increase in physical productivity; . . .

* * * * *

". . . The United States, for example, can hardly help but grow at the rate of 3 per cent or more, even if we do not rouse ourselves but merely keep our system working reasonably well." Paul A. Samuelson, *Economics*, Sixth Edition, page 792.

See also the Keynesian philosophy of economy. U.S. Business in 1965, The Economy, *Time*, December 31, 1965, pp. 64-67B. The Federal Government's theory of economy sets the pattern for wage increases as well as taxes. (See discussion *infra* paragraph (d) re tax treatment of the damage issue.)

c. The District Court Erred in Failing to Allow Pre-Judgment Interest.

In its calculation of the “present value” of lost future earnings the Court below took the figures given by the actuary effective as of the date of death June 20, 1961 and carried them forward five years to the date of the Decision at the same interest rate of $3\frac{3}{4}\%$, *eliminating* any interest on the amounts which would have been earned during that same period. (D. para. 70(h), R. 602, 603; para. 71(b), R. 606, 607.) This method effectively eliminated all pre-judgment interest for the five year period before Plaintiffs were able to obtain their judgment.

“In computing present value in wrongful death cases a mistake is frequently made in considering lost contributions from the date of death through the . . . life expectancy of . . . the decedent, and computing the ‘present value’ of that sum as though it were to be received entirely in the future. The fact of the matter is that by the time cases get to trial, several years have usually elapsed from the time of death. Reduction to present worth should be made on that part of the pecuniary loss that would be received in the future, as of the date of the jury’s determination, but as to those monetary contributions that would have been received prior to the jury’s determination interest should be added, since that is a past loss rather than a future loss. Thus, assuming that the death occurred two years ago at a time when the decedent had a life expectancy of 20 years, and assuming further that the annual contributions to his family amounted to \$10,000, the jury should consider the fact that \$20,000 has already been

lost, *in the past*, and that more than \$20,000 should be awarded to fairly compensate the beneficiaries. As to future loss the jury must deduct the two years that have expired from the then life expectancy of the deceased, and compute the present value of \$10,000 lost annual contributions for 18 years in the future.” 1 Kreindler, *Aviation Accident Law*, §13.06(1), p. 414 (1963).

The Supreme Court of Hawaii has not specifically passed on the issue of pre-judgment interest in death cases. It has held that “general damages” need not be reduced to present value but that “special damages” must be so discounted. *Ginoza v. Takai Electric Co.*, 40 Haw. 691, 705-708. Since that case involved a jury verdict, the opinion merely deals with generalities relating to instructions to the jury and does not refine the meaning of “present value.”

Nor was the specific issue raised in *United States v. Hayashi*, 282 F. 2d 599 (C.A. 9). Although the case was tried to a judge the present value of the loss of future support was calculated “on the basis of a formula agreed upon by the parties.” (282 F. 2d at 601).

Pre-judgment interest is normally not allowed in *personal injury* cases on the theory that they are unliquidated claims. However, the better reasoned and apparent majority view is that a *death claim* is different and that the damages should be considered liquidated as of the date of death.

“Where a claim accrues as of a certain date and can be ascertained or computed as of that

date, we think the better rule is to award interest upon the claim from that day forward In this case the total injury and whatever award was to be made therefor accrued with the death From that date forward it is proper that the defendant should pay interest in order that there may be a full award of damages. Certainly, if prospective damages are to be reduced to present worth, it is equally just that damages which have accrued should carry interest from the date of accrual, whether that date be death or otherwise." *Currie v. Fiting*, 375 Mich. 440, 134 N.W. 2d 611.

See also: 25 C.J.S., *Death*, §109, p. 1261 n. 18; *Bridenstein v. Iowa City Electric Ry. Co.*, 181 Iowa 1124, 165 N.W. 435; *American Ins. Co. v. Naylor*, 103 Colo. 46, 87 P. 2d 260; *Pepin v. Beaulieu*, 102 N.H. 84, 151 A. 2d 230; *Nou v. United Aircraft Corp.*, 342 F. 2d 232 (C.A. 3); *Moore-McCormack Lines, Inc. v. Richardson*, 295 F. 2d 583 (C.A. 2), *cert. denied*, 368 U.S. 989, *reh. denied*, 370 U.S. 965; *National Airlines, Inc. v. Stiles*, 268 F. 2d 400 (C.A. 5).

See also: *Annotation*: 96 A.L.R. 2d 1104; 29 N.A.C.C.A. L.J. 342-347, 24 N.A.C.C.A. L.J. 247; 110 U. Pa. L. Rev. 612-620.

The fairness of such an approach is emphasized in the problems besetting litigants today in getting their cases tried. Five years is a long time from accrual of cause of action to judgment, including over one year necessary for the Court below to write its decision in such a complex case as this.

The appropriate rate of pre-judgment interest should be six percent. Revised Laws of Hawaii 1955, ch. 191.

- d. **The District Court Erred in Deducting Estimated Income Taxes From Decedent's Anticipated Future Earnings in Calculating the Present Value of the Portion Thereof Which the Court Found He Would Have Contributed to His Family. (D. para. 70(i), R. 603-4.)**

This issue was briefed at length in the Court below. (R. 399-401, 405, 406, 431-443, 500-503). Since then the question has become moot, since the Supreme Court of Hawaii has decided that:

“We are in agreement with those jurisdictions which hold that the incidence of taxation is not a proper fact for a jury’s consideration since ‘it introduces a wholly collateral matter into the damage issue’. *Missouri-Kansas-Texas R.R. v. McFerrin*, 156 Tex. 69, 90, 291 S.W. 2d 931, 945. *Altemus v. Pennsylvania R.R.*, 32 F.R.D. 7; *Hardware Mutual Cas. Co. v. Harry Crow & Sons, Inc.*, 6 Wis. 2d 396, 94 N.W. 2d 577; *Bracey v. Great Northern Ry.*, 136 Mont. 65, 343 P. 2d 848 *cert. denied*, 361 U.S. 949 (1960)” *Kawamoto v. Yasutake*, H., No. 4428 In The Supreme Court of the State of Hawaii, February 1, 1966.

That case had to do with an instruction regarding nontaxability of the award. Nevertheless it is a broad statement of the thesis and undoubtedly includes reduction of the award for taxes on lost future earnings.

In *Hardware Mutual Cas. Co. v. Harry Crow & Sons, Inc.*, 6 Wis. 2d 396, 94 N.W. 2d 577, 582 the court stated:

“(b) *Award for lost earnings.* Defendants suggest that since the earnings Huber would have received, had he not been injured, would have been subject to income tax and since the award will not be subject to income tax, the jury should be instructed accordingly so that it will make an appropriate reduction in the amount. Defendants rely upon a decision of the English House of Lords. *British Transport Commission v. Gourley* (1956) A.C. Law Reports 185.”

(where an award for loss of future earnings was reduced by the probable tax thereon.) The Court cited with approval the *dissenting* opinion in that case.

In *Bracey v. Great Northern Ry.*, 136 Mont. 65, 343 P.2d 848, 853, *cert. denied*, 361 U.S. 949, the court cited with approval *Combs v. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 135 F. Supp. 750, 751 (D.C. Iowa) as follows:

“The Courts seem well agreed that the future tax liability is subject to too many variables to be a matter of consideration in an award for *future impairment of earning capacity*.” (Emphasis added.)

The only conclusion that can be drawn from the foregoing is that the case should be remanded with instructions to the District Court to recalculate the “special damages” without any “discount” for income taxes.

There is one possible alternative if the Court should follow the rationale of *O'Connor v. United States*, 269 F. 2d 578 (C.A. 5). If a distinction is

made based upon "The compensatory nature of the right to damages under the Tort Claims Act", then the damages against the United States *only*, as opposed to Baker, might require "such consideration of Federal Income Taxes." (269 F. 2d at 584). See following discussion under subparagraph (e).

- e. **The District Court Erred in Refusing to Allow the \$250 Portion of the Reasonable Burial Costs Which Was Paid by the Veterans Administration as Damages to the Estate Against the Defendant Baker.** (D. para. 71(a), R. 605.)

The collateral source doctrine is well established in the law today although it has been subject to some criticism by the students of the law. 22 Am. Jur. 2d, *Damages* §206 et seq.; *Annotations*: 18 A.L.R. 678, s. 95 A.L.R. 575; 4 A.L.R. 3d 535. The only exception is under the Federal Tort Claims Act which has been said to be remedial in nature. Even this approach is questionable when it is observed that the Act adopts causes of action of the *lex locus delicti*. Nevertheless the Supreme Court has so decided in cases where the plaintiff has received compensation as a result of injury or death from some other source of *unfunded* revenues. *Brooks v. United States*, 337 U.S. 49, 54; on remand, *United States v. Brooks*, 176 F. 2d 482 (C.A. 4); *United States v. Gray*, 199 F. 2d 239, 244 (C.A. 10).

Thus, Plaintiff concedes that such a deduction from the award to the Estate against the United States was proper in this case. But that does not absolve Baker from liability therefor. *United States v. Hayashi*, 282 F. 2d 599, 603, 604 (C.A. 9); *Gypsum Carrier Inc. v.*

Handelsman, 307 F. 2d 525 (C.A. 9). See, *Annotation*: 4 A.L.R. 3d 517.

- f. **The District Court Erred in Its Determination of the General Damages Allowed to the Wife of Decedent by the Court Placing Itself in the Position of an Average Citizen and Jurymen in the Community Rather Than Based on the Court's Own Individual Judgment.**

In referring to the general damages to be awarded to the wife of decedent the Court below stated in Paragraph 71(d) of its Decision (R. 612):

"However, this Court must fix a monetary amount for this loss and this Court feels that it is not amiss for a judge in a case like this to try to put himself in the place of average citizens and jurymen, and try to reach an amount that he has reason to believe would approximate what such a jury in his community, without undue emotional influence, would award as reasonable. This the Court has tried to do. . . ."

"When a case is tried without a jury the judge occupies a dual position; he is the magistrate required to lay down correctly the guiding principles of law and *he is also the tribunal compelled to determine what the facts are.*" (Emphasis added.) 89 C.J.S. *Trial*, §574, p. 351; *Territory v. Fujiwara*, 33 Haw. 428, 431.

". . . the Court, as trier of the facts, cannot delegate its duty to a jury except as provided by law, and under a statute making it mandatory for the court to decide issues of fact where the parties have waived a jury trial the court cannot frame special issues for a trial by jury without the con-

sent of the parties who have waived trial by jury; . . .” 89 C.J.S. *Trial*, §580, pp. 357, 358.

See Rules 38(d) and 52(a), Federal Rules of Civil Procedure.

As this Court has stated once more from *United States v. Hayashi*, 282 F. 2d 599, 602 (C.A. 9):

“It is the function of the fact finder to evaluate all the evidence produced on the question of damages.”

It is the duty of the trial judge to *personally* evaluate the damages, even though such elements of general damage “are difficult of exact estimation and to which no standard of value is applicable.” *Gabriel v. Margah*, 37 Haw. 571, 581.

What the Court below has done is to make an extremely sophisticated computation of special damages far beyond the capacity of a normal jury and then when it came to general damages merely “second guessed” what a local jury would award. In effect the Court was thereby taking judicial notice that jury verdicts are low in Hawaii. This is emphasized by the contrast between the amount of special and general damages awarded to the wife of decedent: \$126,216.46 vs. \$50,000.

The measure of general damages to Mrs. Furumizo is as set forth in *Ginoza v. Takai Electric Co.*, 40 Haw. 691. The following is a quote of the language from the instruction approved in that decision paraphrased to incorporate the appropriate language of Revised Laws of Hawaii, 1955, §246-2:

“... the damage, if any, arising from the loss of (love, affection, society, companionship, comfort, consortium, protection, fellowship, marital care, attention, advice and counsel of her husband Robert) having regard to the probable duration of his life, the *amount he has customarily contributed to the support and well-being of his wife*, if anything, and *what in (the court’s) judgment, he would have contributed to her during the remainder of his life* but for the accident causing his death, taking into consideration the age, health, habits, expectation of life, mental and physical capacity for and disposition to labor, and the probable increase or diminution of that ability with the lapse of time, *his earning power and rate of wages:*” (emphasis added). 40 Haw. at 706.

Thus, contrary to the views of the Court below (D. para. 71(d), R. 611) the Supreme Court of Hawaii has held that there is and should be, a direct relationship between special and general damages in death cases.

As difficult as it might have been it was the obligation of the trial judge to *subjectively* evaluate the general damages, which he admittedly did not do.

g. **The District Court Erred in Its Determination of the General Damages Allowed to the Wife of Decedent by Taking Into Consideration Her (Favorable) Prospects of Remarriage and Her Employment, Health and Earning Capacity.**

In rationalizing the low award for general damages to the wife of Decedent the Court below stated (D. para. 71(d), R. 610):

“In the present case we have a *healthy*, well-educated, *attractive* young woman, only 27 years old, in 1961, with a single young child, who has a much better *prospect of remarriage* and much greater *earning ability*. . . .” (Emphasis added.)

Damages should not be reduced or mitigated by virtue of the fact that the surviving spouse has remarried or is engaged to be married. 25 C.J.S., *Death*, §114, p. 1263. Damages of a widow for the death of her husband are not to be confined to the period of her widowhood. *Gulf C. & S. F. Ry. Co. v. Moser*, (Tex. Civ. App.), 277 S.W. 722, *rev'd on other grounds*, 275 U.S. 133. With respect to the *possibility* of remarriage see *Johns v. Baltimore & O. R. Co.*, 143 F. Supp. 15 (D.C. Pa.), *aff'd*, 239 F. 2d 385 (C.A. 3); *Curnow v. West View Park Co.*, 220 F. Supp. 367 (D.C. Pa.).

Evidence as to the health of the beneficiary is irrelevant and inadmissible. 25 C.J.S. *Death*, §127, p. 1296, ns. 88 and 89; *Seattle Electric Co. v. Hartless*, 144 F. 379; *Benton v. Chicago etc. R. Co.*, 55 Iowa 496, 497, 8 N.W. 330; *Simonean v. Pac. Elect. R. Co.*, 166 Cal. 264, 136 Pac. 544.

It is wholly immaterial in determining damages for wrongful death whether the next of kin of the deceased had or had not other pecuniary resources (such as earning capacity) after his death. 25 C.J.S. *Death*, §126, p. 1295, n. 73; *Wilcox v. Bied*, 330 Ill. 571, 162 N.E. 170; *Johnson v. Western Air Express Corp.*, 45 Cal. App. 2d 614, 114 P. 2d 688; *Stathos v. Lemich*, 213 Cal. App. 2d 52, 28 Cal. Rptr. 462; *Columbia*

Grocery Co. v. Schlesinger, 102 Ind. App. 617, 200 N.E. 414; *Presley v. Upper Miss. Towing Corp.* (La.), 153 So. 2d 416, writ ref., 244 La. 1002, 1003, 156 So. 2d 56; *Crawford v. Hite*, 176 Va. 69, 10 S.E. 2d 561; *Matthews v. Hicks*, 197 Va. 112, 87 S.E. 2d 529; *Allen v. Hart*, 32 Wash. 2d 173, 201 P. 2d 145.

In addition to the question of pre-judgment interest the Court will also have to determine the date from which interest on the judgment starts to run as it is affected by the modifications in the amount of the judgment as a result of this cross-appeal. See *Annotation*, 4 A.L.R. 3d 1221.

CONCLUSION

For the reasons stated the judgment below as to liability and damages unchallenged on this Cross-Appeal should be sustained as to both defendants jointly and severally and the case remanded with directions to the Court below to increase the amounts of damages in accordance with foregoing points made on this Cross-Appeal.

Dated, Kailua, Kona, Hawaii,
August 17, 1966.

Respectfully submitted,

E. D. CRUMPACKER,
*Attorney for Plaintiffs, Appellees
and Cross-Appellants.*

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

E. D. CRUMPACKER.

FEB 14 1967

No. 20,641

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA
and BAKER AIRCRAFT SALES, INC.,
*Defendants, Appellants and
Cross-Appellees,*

VS.

BETTY K. FURUMIZO,
*Plaintiff, Appellee and
Cross-Appellant.*

On Appeal from the United States District Court
for the District of Hawaii

**ANSWERING BRIEF ON BEHALF OF CROSS-APPELLEE
BAKER AIRCRAFT SALES, INC.**

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**On Appeal from the United States District Court
for the District of Hawaii**

**ANSWERING BRIEF ON BEHALF OF CROSS-APPELLEE
BAKER AIRCRAFT SALES, INC.**

**I. THE COURT BELOW ERRED IN HOLDING DEFENDANT,
BAKER AIRCRAFT SALES, INC. LIABLE.**

Cross-appellant argues that because Shima was the licensed pilot, his employer is liable as a matter of law where a crash such as this occurs. If this is in fact the law, it seems a bit unusual that no case so holding by the Federal Courts has been cited to support it. The one case relied upon is that of *Lange v. Nelson-Ryan Flight Service, Inc.*, 259 Minn. 460, 108

N.W. 2d 428 (1961). That case, as pointed out in our opening brief, is in conflict with the case of *Haddon v. Atkinson*, Civil No. 1023, Circuit Court, Third Circuit, State of Hawaii, where a crash occurred while a plane was operating on an instrument clearance under instrument weather conditions and only one of the two pilots had an instrument rating. The court nevertheless held that neither could recover from the other.

Cross-appellant in her brief contends that Hawaiian precedent should not be followed and cites cases from jurisdictions where lower court decisions are not recognized by other courts at the same judicial level as precedents. However, cross-appellant cites no case holding that such is the rule in Hawaii. The common law of Hawaii is established under Sec. 1-1 R.L.H. 1955 which provides:

“The common law of England as ascertained by English and American decisions is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; . . .”

It will be noted that the Statute in question does not refer alone to decisions by the Supreme Court of Hawaii. The Statute was first adopted in 1892 and as the early volumes of the Hawaiian Reports show, prior to that date it was the custom to report decisions of Justices of the Supreme Court acting

at the nisi prius level as well as decisions by the court acting at the appellate level. Thus, the Statute obviously contemplated that trial decisions would be precedents in Hawaii. For example, the case which established a widow's right of action for the death of her husband in Hawaii, *Kake v. Horton*, 2 Hawaii 209 (1860) was a decision at the trial level rather than on appeal.

Cross-appellant argues that plaintiff's Exhibit 7, the report filled out by George R. Carter listing Shima as the pilot, establishes that he was at the controls as a matter of fact. Yet, as the trial court noted at the time:

“It's obvious that he couldn't know that of his own knowledge.” (Tr. 808-809.)

She argues that there was a finding that Shima was in fact negligent. The decision of the court below will be searched in vain for such a finding.

At page 4 of her brief cross-appellant cites the exchange between her counsel and the court at the hearing on the motion for a new trial. The comments of the court at that time are certainly not findings since a court simply cannot amend its decision in such a manner. If cross-appellant desired to have additional findings she should have followed the provisions of Rule 52 (b) Hawaii Rules of Civil Procedure and requested additional findings. To simply walk into court and ask the court, without notice and without reducing the requested findings to an intelligible form, to change its decision in order to frustrate a motion

for a new trial does not fall within the scope of the provisions of the Rules of Civil Procedure. And to have the court do so obviously only compounds the error which the court made when it permitted an issue not fairly raised by the pretrial order to be the deciding factor in the case.

Cross-appellant argues that Baker is on the horns of a dilemma in this case with respect to the so-called two findings of negligence. Cross-appellee Baker takes the position that it is cross-appellant who is on the horns of a dilemma, for obviously a finding that Shima was improperly trained with respect to wake turbulence excludes logically a finding that he negligently took off knowing the dangers of wake turbulence. The two are inconsistent, and no amount of soothsaying can change that fact.

Cross-appellant claims to rely upon the testimony of Joseph Eshleman Jones. However, the material upon which cross-appellant relies was stricken by the court. (Tr. 1345.) The material at page 1331 which is relied upon has to do with the instruction given to students, not the instruction given to instructors. The cross-examination relied upon does not deal with the standards of training instructors, as a reference to the material cited will show. (Tr. 1351-1354.)

No one is attempting to overcome the liberality of the rule on amendments, but Baker is most vociferously contending that it did not have its day in court on the issue of the standards for the training of instructors because that issue was not present in the

pleadings, nor in the pretrial order, nor in the trial. It was injected by the court below in its decision fourteen months after the trial ended.

II. THE COURT BELOW ERRED IN FAILING TO FIND THAT THE DECEDENT, ROBERT FURUMIZO, WAS CONTRIBUTORILY NEGLIGENT.

There appears little need to go over again the material cited and relied upon in appellant Baker's opening brief. Nothing which cross-appellant has said detracts from the argument there set forth. Therefore, the argument appearing at pages 27 and 28 of appellant Baker's opening brief is respectfully called to the Court's attention.

III. THE COURT BELOW AWARDED ERRONEOUS AND EXCESSIVE DAMAGES.

As pointed out in appellant Baker's opening brief, the court below awarded promotions to the decedent which the evidence did not justify and which even the cross-appellant's counsel admitted was beyond what he could make a strong contention for. Despite this fact cross-appellant now contends that the evidence justified the court's findings awarding the decedent two promotions, from GS7 to GS9 and subsequently from GS9 to GS11. She cites *Ginoza v. Takai Electric Co.*, 40 Hawaii 691 (1955) where the Hawaii Supreme Court upheld an award of damages and in so doing noted that the decedent would prob-

ably have developed into a first class mechanic. That finding, however, was supported by the evidence in the case. Here the standard laid down in *Condron v. Harl*, 46 Hawaii 66 (1962) was not met.

Cross-appellant also cites *Rohlfing v. Moses Akiona, Ltd.*, 45 Hawaii 373 (1961) but that case merely holds that the estate of a deceased four-year-old has a cause of action for damages. It does not attempt to measure the damages or go into how they can be proved.

The other points argued in cross-appellant's brief are sufficiently covered in appellant Baker's opening brief.

IV. NONE OF THE POINTS RAISED BY CROSS-APPELLANT ON CROSS-APPEAL URGING AN INCREASE IN THE AMOUNT OF DAMAGES AWARDED ARE MERITORIOUS.

A.

There was no error in failing to adjust the special damages to compensate for the decrease in the value of the dollar through the period of decedent's life expectancy.

Cross-appellant's brief argues that:

“Based upon numerous authorities, including the unequivocal statement in 25 C.J.S., Death, Sec. 100 at page 1242 that ‘Damages should be increased in proportion to the diminishing purchasing power of the dollar,’ taken together with the testimony of Myles Grover (the actuary called by the plaintiffs) relating to Chart II, BS. F.P.M. Supp. 992 (Exhibit P-44), there is both a testimonial basis in the record as well as a legal basis for taking into account the future

anticipated decreasing value of the dollars resulting in necessary increases in salaries.”

Cross-appellant calculates that the purchasing power of the dollar will decline so that in each year after 1965 we will need 3.3 cents more than in the previous year to buy what a dollar would buy in 1965. Thus, they calculate that \$1.033 in 1966 will buy what \$1.000 bought in 1965, while \$1.066 in 1967, \$1.495 in 1980, and \$1.825 in 1990 will be needed to buy a dollar's worth of goods in terms of today's money. The fundamental assumption is that in calculating cross-appellant's support for future years, we must take into account that the dollars of those future years will be less than today's dollars in real purchasing power.

Cross-appellant's calculations contain a fundamental error; they are not supported by law or fact; and even accepting their erroneous theory, are miscalculated.

Cross-appellant's fundamental error is that she has not applied her assumption across the board. If the calculation had the reasoning behind the figures added, they would run something like this: Calculating on today's pay scale Robert Furumizo would have made \$10,465.00, including C O L A, in 1990, which reduced to present value is \$3,597.87, but because of inflation \$1.825 will be necessary in 1990 to have the purchasing power of one of today's dollars. Therefore, \$1.825 in 1990 is the equivalent of \$1.000 in 1965, and

\$6566.11 in 1990 is the equivalent of \$3597.87 in 1965, so we need \$6566.11 to replace the lost earnings for 1990. From this point cross-appellant's fallacy is easy to see. The \$6566.11 she asks are the inflated 1990 dollars, but the judgment cross-appellant seeks is that such dollars are to be paid now, not in 1990; and in today's dollars, not in 1990 dollars. Thus, to calculate the equivalent of \$6566.11, we must divide by \$1.825 and we get \$3597.87, which brings us back to where we started. This will be true no matter what factor we assume to represent inflation. The future equivalent in purchasing power of one dollar of today's money must of logical necessity be one dollar when expressed in terms of today's money.

Cross-appellant introduced no evidence that the 3.3% trend which she was able to detect in the Federal pay scale would continue. She called no economist as an expert witness to say that this would be so, or to explain what had caused the trend. Her expert, Mr. Grover, said it was not within his limits of expertise to say what causes wage increases (Deposition of Myles Grover, page 25), or whether they will continue (page 27).

Without being economists ourselves, we can out of common knowledge say that the prediction of economic trends is a very risky business. Even for the near future, there are nearly as many predictions as there are economists. It is probably safe to assume that the changing purchasing power of the dollar has some correlation with the change in government

wages, but cross-appellant has introduced no evidence of what the changes in the purchasing power of the dollar will be, or even what they have been. There are numerous indices of the cost of living and it takes an economist to choose between them and explain the significance of each. Cross-appellant has not offered one.

Using a layman's approach, we know that the years 1928-1945 were years of great economic stress. They began with the great boom of the late twenties, went through the 1929 crash, the great depression, and the strong inflationary pressures that followed. According to cross-appellant's theory Congress would have followed these trends. What actually happened? Nothing. In 1930, in the depths of the depression, Congress actually gave its employees in the lower bracket, equivalent to GS7, a small raise. Otherwise Federal pay scales remained absolutely unchanged for these seventeen years of violent economic change. Of course, this was because Congress was trying to counteract the economic pressures, but it shows how successfully Congress can do so.

As cross-appellant's own expert recognized, the question of what will happen to Federal wage rates is very much speculation as to what changes Congress will make in the law. (Deposition of Myles Grover, page 27.) This is the testimony of cross-appellant's only witness on this point, and the testimony is that he does not know. As a matter of fact, cross-appellant failed to (1) Produce any expert economic testimony;

(2) Produce any evidence of the changing value of the dollar; (3) Produce any evidence that Federal wages must follow the changing value of the dollar.

As a matter of law, cross-appellant says her argument is based on numerous authorities, but fails to cite any in her brief except 25 C.J.S., Deaths, Sec. 100, page 1242 and Time Magazine.

The cases to which the C.J.S. statement refer are comparison cases; that is, cases in which appeal courts judged the propriety of remittitur by comparing the amount of the verdicts before them with verdicts which they had either affirmed or remitted in other cases. Where the earlier case was an old one, the court allowed for the change in the real value of money. Cross-appellant has not cited a single case in which a prediction of future decreases in the value of the dollar has been used to increase the amount of the judgment as she seeks to do here. It might be pointed out that the 3.3% figure was calculated by using a base year of 1923 and going forward on a straight arithmetic progression through 1964. Cross-appellant shifts the base year to 1965, and this is totally out of accord with her calculations because the 1965 base is approximately three times higher than the 1923 base. In other words, a 3.3% increase from 1965 to 1966 would be approximately a 9.9% increase, if 1923 were the base year.

Basically judgments are paid in today's dollars. There is no evidence, and there is no law, to support the speculative and conjectural argument by which

cross-appellant seeks to have a judgment paid in today's dollars but to use 1990's amount of dollars.

B.

The lower court did not err in refusing to allow prejudgment interest.

The Hawaiian cases which have dealt with the measure of damages in death actions are *Kake v. Horton*, 2 Hawaii 209 (1860); *Ferreira v. Honolulu R.T. & L. Co.*, 16 Hawaii 615 (1905); *Wada v. Associated Oil Co.*, 27 Hawaii 671 (1924); *Enos v. Motor Coach Co.*, 34 Hawaii 5 (1936); *Gabriel v. Margah*, 37 Hawaii 571 (1947); *Ginoza v. Takai Electric Co.*, 40 Hawaii 691 (1955); and *Rohlfing v. Akiona, Ltd.*, 45 Hawaii 373 (1961).

In none of these cases has interest on the judgment prior to the date of judgment been allowed. The Hawaiian Statute on interest clearly contemplates that the interest shall be on the judgment recovered, and therefore, shall be post-judgment interest. It provides:

“Interest at the rate of six percent per annum and no more, shall be allowed on any judgment recovered before any court in the Territory in any civil suit.” Sec. 191-2, R.L.H. 1955.

C.

The lower court did not err in deducting estimated income taxes from decedent's anticipated future earnings.

The Hawaiian Statute on wrongful death actions provides:

“In any such action under this section such damages may be given as under the circumstances

shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection including (a) loss of society, companionship, comfort, consortium or protection, (b) loss of marital care, attention, advice or counsel, (c) loss of filial care or attention or (d) loss of parental care, training, guidance or education suffered as a result of the death of the person by the surviving spouse, children, father, mother, and by any person wholly or partly dependent upon the deceased person. The jury, or court sitting without jury, shall allocate the damages to the persons entitled thereto in its verdict or judgment, and any damage recovered under this section, except for reasonable expenses of last illness and burial, shall not constitute a part of the estate of the deceased. If an action is brought pursuant to this section and a separate action brought pursuant to Section 246-6, such actions may be consolidated for trial on the motion of any interested party, and a separate verdict, report or decision may be rendered as to each right of action. Any action brought under this section shall be commenced within two years from the date of death of such injured person." Sec. 246-2, R.L.H 1955.

The appeal in this case was taken only by Betty K. Furumizo individually. The injuries to her, and for that matter, to her infant daughter are obviously measured only after income taxes have been deducted.

This is not the injection of a collateral matter such as was present in the case of *Kawamoto v. Yasutaka*, 49 Hawaii 42 (1966) where the court stated that the

question of income taxes should not be injected into the case for the consideration of the jury. Here we are considering, not what Robert Furumizo might have earned during his life, but what the cross-appellant lost as a result of his death. She obviously did not lose the amount of taxes which would have been paid to the Federal government since she would never have had them anyway, anymore than she lost the amount of decedent's personal expenses. See *Ginoza v. Takai Electric Co.*, 40 Hawaii 691 (1955). Therefore, under the decisions of this court, *Southern Pacific Co. v. Guthrie*, 186 Fed. 2d 926, C.A. 9, Certiorari Denied, 341 U.S. 904 and other cases there cited, and under the decisions in such cases as *O'Connor v. U. S.*, 269 Fed. 2d 578, C.A. 2; *Moffa v. Perkins Trucking Co.*, 200 Fed. Supp. 183 (Conn.); and under the Hawaiian Statute, the cross-appellant here is not entitled to the amount of income taxes which would have been paid to the Federal government, either from Baker or from the Federal government.

The defendant, United States, points out that under the Tort Claims Act it cannot be held liable for the amount of income taxes. The anomalous situation here is that if Baker is held liable, the United States does not get the money, but the cross-appellant does. This defies logic and reason. Obviously, the decision of the court below was correct.

D.

The court did not err in refusing to allow the \$250 portion of reasonable burial costs paid by the Veterans Administration as to cross-appellant, Baker Aircraft Sales, Inc.

Regardless of the argument that is made by the cross-appellant, the fact is she joined and made the self-same claims against both of the defendants and their cases should stand on an equal footing. Moreover, the fact remains that she did not appeal in her capacity as administratrix of her deceased husband's estate, and under the Hawaiian Statute, burial expenses are recoverable by the estate. Section 246-2, R.L.H. 1955. Therefore, there can be no reversal for this disallowance.

E.

There was no error in the court's approach to the overall question of determination of the amount of damages.

Cross-appellant has urged that the court erred in trying to place itself in the position of the ordinary jurymen in considering the case and in taking into consideration the favorable prospects of remarriage, employment, health and earning capacity of cross-appellant, Betty Furumizo. Obviously, these are common sense matters which a court would have to take into consideration in determining the kinds of damage and the pecuniary value thereof under the provisions of the Hawaiian Death Statute. Favorable prospects for remarriage, good health, employment, etc., all bear on the elements of loss of society, marital care, etc. Any judge must, in attempting to arrive at a fair and just amount of compensation, take into

consideration the standards of the community. This is all that has been done here.

If this approach by the trial judge is erroneous, then the judgment must be set aside and a new trial granted on the overall issue of damages.

Cross-appellee, Baker Aircraft Sales, Inc., has argued that the amount of damages awarded was excessive, and obviously would therefore be willing to have the whole question of damages retried, if this is what cross-appellant has in mind.

V. CONCLUSION

For the reasons stated above, the cross-appeal should be dismissed and the cause reversed for disposition as prayed in appellant Baker's opening brief.

Dated, Honolulu, Hawaii,

November 26, 1966.

Respectfully submitted,

FRANK D. PADGETT,

*Attorney for Defendant, Cross-Appellee
Baker Aircraft Sales, Inc.*

PADGETT AND GREELEY,

Of Counsel.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK D. PADGETT

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*Plaintiff-Appellee and
Cross-Appellant.*

**ANSWERING BRIEF OF BAKER AIRCRAFT SALES, INC.
TO OPENING BRIEF OF APPELLANT
UNITED STATES OF AMERICA**

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No. 20,641

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA and BAKER AIRCRAFT SALES, INC., <i>Defendants-Appellants,</i> vs. BETTY K. FURUMIZO, <i>Plaintiff-Appellee and</i> <i>Cross-Appellant.</i>	}
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**ANSWERING BRIEF OF BAKER AIRCRAFT SALES, INC.
TO OPENING BRIEF OF APPELLANT
UNITED STATES OF AMERICA**

JURISDICTION

The jurisdiction of the District Court was based on Title 28, United States Code, Sections 1332, 1346(b) and 2671 *et seq.* The jurisdiction of this Court rests on Title 28, United States Code, Section 1291. Judgment was entered June 22, 1965 (R. 614), motions for new trial were timely filed (R. 628-633) and on October 1, 1965, an order was entered denying the motions for new trial (R. 693), notice of appeal was filed by the United States on November 26, 1965.

STATEMENT OF THE CASE

Appellant United States' statement of the case is accurate in so far as it goes; however, it omits practically all of the facts upon which its liability was based. A detailed recitation of the various statutes together with the regulations, bulletins and other evidence which led the Court below to the conclusion that the United States was negligent, appears in the opinion of the Court below beginning with numbered Finding 57 appearing in *Furumizo v. United States*, 245 F.Supp. 981 (1965) at page 998, through Finding 68, concluding at 245 F.Supp. page 1012.

At the time of the accident, Mr. Humphreys who was deceased at the time of trial, was actually handling the local control position under the supervision of the witness Garcia who testified at trial (Tr. 924). Garcia had read, and was aware of the material contained in Exhibit P-15 with reference to wake turbulence including the statement "severe vortex turbulence has a duration from 30 to 60 seconds, (1 to 3 miles) after the passage of a large airplane which caused it, and may persist much longer under favorable conditions". He was also aware of the statement in that Exhibit:

"The roll effect of a trailing vortex from a large airplane, either propeller driven or jet, can exceed the aileron controllability of a small airplane flying parallel to it."

and of the statement:

"The vertical gusts encountered when crossing laterally through the trailing vortices behind a large airplane can impose structural loads as high

as 10 G's on a small airplane flying at a high angle of attack." (Tr. 1123, 1124)

The Piper Cub had been held at its position on the runway approximately 1,000 feet from the intersection of runways 4 left and runway 8 on instructions from the tower. The plane could not move from that point until released by the tower (Tr. 1100). Garcia assumed when the plane was cleared that it was going to make its takeoff starting from that point (Tr. 1103, 1104). He was aware of the provisions of the Air Traffic Rules including that portion of Section 60.21 (Exhibit G-1) which states:

"When an air traffic clearance has been obtained under either the VFR or IFR rules, the pilot in command of the aircraft *shall not deviate* from the provisions thereof unless an amended clearance is obtained." (Tr. 1106, 1107)

As a matter of fact, as is noted in Exhibit P-17:

"A common understanding exists, by rule and by practice, that an air traffic control clearance is an 'authorization,' the provisions of which become binding *after* it has been accepted by the pilot."

With respect to clearances the Government had stated in its Flight Information Manual corrected as of the date of the accident (Exhibit G-6):

"However such clearances will not be issued unless, in the opinion of the tower, the anticipated action can be safely completed from a collision hazard standpoint if reasonable caution is exercised by the pilot."

Garcia testified that with respect to departing aircraft operating on the same runway, that no clearance would be issued unless the preceding aircraft had either crossed the opposite end of the runway or turned away from the path of the succeeding aircraft before the latter began its takeoff run (Tr. 1121). However, with respect to intersecting runways, he would issue a clearance as soon as the intersection had been cleared by the previous departing aircraft regardless of how close the other plane was to that intersection (Tr. 1122). He admitted that the provisions of Sections 422 and 423 of ATM-2-A (Exhibit G-5) were not applicable in the case of aircraft operating on intersecting runways (Tr. 112) and that therefore it was a situation where the controller was expected to use his best judgment under the provisions of Section 100.7 of ATM-2-A (Exhibit G-5), (Tr. 1122). Yet when asked, Question: "so that no matter where the aircraft is, you will clear him for takeoff, regardless of wake, regardless of traffic, regardless of whether he has got passengers on board, regardless of anything, you'd clear him?" Answer: "I would clear him." (Tr. 1150) Garcia had an override mike so that he could step in and take over air traffic control from trainee Humphreys, but on this occasion, although he was monitoring the transmissions, he saw no reason to do so (Tr. 1105).

Garcia understood the function of air traffic control to be "To expedite traffic in a safe, expeditious manner. To prevent any collisions of known aircraft." (Tr. 1108), and he understood that the term "col-

lision" as used in ATM-2-A included collisions between aircraft and vehicles on the ground and other obstructions (Tr. 1108-9). He admitted that there was no definition of a collision contained in Exhibit G-5. The attitude of the tower control personnel is rather forcefully illustrated by the testimony of Capellas, the ground controller who was in the tower at the time, whose position was that when he is working as local controller, he would clear an airplane for takeoff even if it was sitting on the end of the runway facing the end, with only ten feet of runway left (Tr. 250).

It is also of significance to note that at Honolulu International Airport, at the time of the accident, the procedures for designating intersection takeoff points had not been inaugurated (Tr. 241, 242) but as is obvious from the transmissions in this case (Exhibit P-5), intersection takeoffs were being authorized by the tower. Both Capellas (Tr. 234) and Garcia (Tr. 1077) saw the Piper Cub commence its takeoff roll. They both knew that the Cub had in fact not delayed its takeoff after receiving the clearance, but had gone forward. They took no further action with respect to the Cub. Garcia believed that wake turbulence would persist from 5 to 7 minutes (Tr. 999).

Professor Lissaman testified that the intersecting runway wake turbulence situation was particularly dangerous because of the fact that both vortices had to be crossed, and that in such a situation the plane should either remain on the ground until the vortices had passed over head, or else should fly above the flight level of the departing aircraft (Tr. 494). He

further testified that it was possible to calculate tables of separation times which would be safe and pointed to the Bleviss report and the tables contained therein (Tr. 393, Exhibit P-38). In his opinion, in the particular situation, it was not possible for the pilot to have recovered from the effect of turbulence and the pilot would not have been able to maintain control of the aircraft (Tr. 441, 488).

Mr. Carmody, an expert for the FAA, took the position that under the then current regulations, so long as the Cub was at least 100 feet back from the intersection, he could be cleared as soon as the other plane crossed the intersecting runway (Tr. 1366), and that in fact control tower operators were encouraged by the Government to issue the clearance just as soon as possible (Tr. 1367).

INTRODUCTION

The United States in this case, urges two claimed errors on this Court:

1. That the Court below erred in not finding the chain of causation broken by the alleged negligence of Shima, the instructor pilot employed by defendant-appellant Baker Aircraft Sales, Inc., and
2. That the Court below erred in finding that the control tower operators were negligent in clearing the aircraft in question.

Section 60.2 of the Air Traffic Rules provides in part:

“The pilot in command of the aircraft shall be directly responsible for its operation and shall have final authority as to the operation of the aircraft.”

Throughout the brief of the United States there seems to run an assumption that because of this rule, the pilot of any aircraft which crashes is automatically liable as a matter of law and the control tower operators are excused from any responsibility whatsoever. This is not the law.

The law in Hawaii is that a chain of causation between a negligent act and the damages is not broken by an intervening negligent act which is foreseeable by the first actor. This is the situation here (assuming that there was negligence on the part of Baker Aircraft Sales, Inc. or its instructor Shima).

As to the question of whether or not the control tower operators acted negligently, in this case, we have a situation where there were in fact no adequate separation standards with respect to aircraft departing on intersecting runways; where the position of the United States was that as long as the departing aircraft had passed through the intersection, then an aircraft on the intersecting runway could be cleared at any time; and where the United States was actually encouraging control tower operators to issue clearances at the earliest possible moment; where in point of fact, the aircraft in question was placed and held on the runway in the position from which it started its takeoff roll, by the control tower operators; and where in fact it could not help but encounter turbulence

which would be beyond controlling; where the control tower operators knew that the airplane would probably commence its roll from that point; where they had no reason to assume that there would be a delay in its commencing its takeoff roll; where they actually observed it commence the takeoff roll and did nothing further; and where the form of words used, when construed together with the other publications of the Government, seemed to give an assurance that it was safe to take off so long as caution was used in flying the airplane. In such a situation, clearly the control tower operators were negligent in carrying out the duty which the statute placed upon them to provide for the safety of air traffic.

ARGUMENT

I. DEFENDANT BAKER AIRCRAFT SALES IS NOT LIABLE AS A MATTER OF LAW SIMPLY BECAUSE SHIMA WAS INSTRUCTOR PILOT IN CHARGE OF THE AIRCRAFT.

Throughout the argument in defendant-appellant United States' brief on the question of causation, there runs the unspoken, but very obvious assumption that because Shima was the pilot in charge of the aircraft, Baker Aircraft Sales, Inc. is automatically liable for any damages resulting from a crash to the aircraft, and the United States is insulated from any negligence which may have contributed to the crash on the part of its employees. This simply is not correct as a matter of law. It is true that the Air Traffic Rules, Section 60.2 provides:

“The pilot in command of the aircraft shall be directly responsible for its operation and shall have final authority as to operation of the aircraft.” (Exhibit G-1)

This however obviously does not place liability as a matter of law upon the pilot or his employer. The matter of whether or not the pilot and the employer are guilty of negligence and whether or not they are liable is a matter to be established through evidence. We have argued the evidence on the subject in defendant-appellant Baker Aircraft Sales, Inc.’s opening brief and see no need to repeat that here.

This Court has made it perfectly plain that the pilot in charge is not in all instances and in all events liable for the crash, for as this Court has said:

“The optimum of safety is sought to be achieved by imposing concurrent duties on the pilots and tower personnel. In any given case, one, both, or neither could be guilty of a breach of the duties imposed.”

United States v. Miller, 303 F.2d 703 (CA 9, 1962 at page 711), cert. denied 371 U.S. 955.

If the real but unspoken premise upon which the United States’ argument is based were true, then the numerous cases dealing with the question of whether or not there is evidence as to who was flying the airplane in question, would be simple *tour de force* since there is always a responsible pilot in charge of any aircraft flight. Compare Annotation 36 A.L.R.2d 1290.

II. ASSUMING ARGUENDO THAT THERE WAS NEGLIGENCE ON THE PART OF THE INSTRUCTOR PILOT SHIMA, THAT DID NOT BREAK THE CHAIN OF CAUSATION.

As is pointed out in the Hawaiian case of *Mitchell v. Branch and Hardy*, 45 Hawaii 128 (1961), quoting from 50 Har. L. Rev., pp. 1125, 1129:

“The earlier of the two wrongdoers, even though his wrong has merely set the stage on which the later wrongdoer acts to the plaintiff’s injury, is in most jurisdictions no longer relieved from responsibility merely because the later act of the other wrongdoer has been a means by which his own misconduct was made harmful. The test has come to be whether the later act, which realized the harmful potentialities of the situation created by the defendant was itself foreseeable.” 45 Hawaii at 136-137.

Here, under the evidence the tower placed and held the aircraft which crashed on the runway at a point approximately 1,000 feet short of the intersection and pointing toward the intersection. Under the evidence, the plane was not at liberty to move from that position because the tower had instructed it to hold that position. The tower then issued the clearance which read:

“Piper 99 Zulu, caution turbulence departing DC-8 cleared for takeoff.”

(Exhibit P-5, Transmission 44)

We submit that this language foreseeably could be construed by a pilot to mean that it is safe to take off so long as caution is used with respect to the tur-

bulence which may be encountered. Exhibit G-6 issued by the Government states:

“However such clearances will not be issued unless, in the opinion of the tower, the anticipated action can be safely completed from a collision hazard standpoint if reasonable caution is exercised by the pilot.”

By regulation it is provided:

“When an air traffic clearance has been obtained under either the VFR or IFR rules, the pilot in command of the aircraft shall not deviate from the provisions thereof unless an amended clearance is obtained.” (Exhibit G-1, Section 60.21)

Thus the United States had recognized that:

“A common understanding exists, by rule and by practice, that an air traffic control clearance is an ‘authorization’, the provisions of which become binding *after* it has been accepted by the pilot.” (Exhibit P-17, page 3)

The witness Carter, an expert pilot, testified that the language appearing in Exhibit G-6 was such that it led pilots to believe that they were under directions to do what the tower told them (Tr. 897). Garcia assumed at the time that unless he was advised of some different intention, the pilot of the Cub was going to make his takeoff run starting from the point at which he was cleared (Tr. 1103). Both he and Capellas actually saw the Cub begin its starting roll but neither did anything to stop it. Yet it is obvious from the various Governmental publications in evidence including Exhibit P-15 with which he admitted familiarity,

and from the testimony of Professor Lissaman that there was great danger to the aircraft in beginning its takeoff roll at that time and place.

Certainly if it is held that there was negligence on the part of the pilot in the aircraft in taking off because of the then current knowledge with respect to the effects of wake turbulence, then it was equally negligent to issue a clearance because of the same knowledge on the part of the control tower operators, it having been stipulated that:

“13. The existence of the potential hazards of turbulent wake of large aircraft to smaller aircraft was a matter of ‘common knowledge’ in the flying industry and specifically to the employees of the defendant U.S.A. and more particularly those in the FAA at the time of the accident.”
(R. 371-380)

And certainly, it was reasonably to be foreseen that a pilot might attempt to take off immediately upon receiving the clearance since the obvious object of the clearance is to give an authorization to takeoff. This was particularly true in view of the wording of the clearance here which seemed to imply that it was safe to take off so long as caution was used when in fact it was completely unsafe to take off. Moreover, the control tower operators actually observed the beginning of the takeoff roll and did nothing to prevent it. In these circumstances it is obvious that the chain of causation was not broken by the alleged subsequent negligence on the part of Baker Aircraft Sales Inc.’s employee Shima.

III. THE FACT THAT THE CONTROL TOWER OPERATORS WERE EMPLOYEES OF THE UNITED STATES DOES NOT EXCUSE THEIR NEGLIGENCE.

On the question of whether or not the United States may be held liable for the actions of the control tower operators, if they are negligent, the law seems to be clear. This Court stated in *United States v. Miller*, 303 F.2d 703 (CA 9, 1962; cert. denied 371 U.S. 955:

“The optimum of safety is sought to be achieved by imposing concurrent duties on the pilots and tower personnel. In any given case, one, both, or neither could be guilty of a breach of the duties imposed.

“This view is implicit in the decision of the court in *Eastern Air Lines v. Union Trust Co.*, 95 U.S.App. D.C. 189, 221 F.2d 62, affirmed, sub nom., *United States v. Union Trust Co.*, 350 U.S. 907, 76 S.Ct. 192, 100 L.Ed. 796. The ultimate result reached in that case recognized that both the Government and the airline had concurrently breached their duties, and each was held liable.” (303 F.2d 703 at 711)

In *Eastern Air Lines v. Union Trust Company*, 221 F.2d 62 (CA D.C. 1955) the court stated:

“It is therefore our opinion that, if a Government towerman negligently clears two planes to land on the same runway at the same time, or is guilty of some other negligent act or omission in doing his work the Government is liable for resulting injury in the same manner and for the same reason that it is liable for injury done by the driver of a mail truck who, in exercising discretion as to how to drive, negligently runs

through a red traffic light.” (221 F.2d 62 at page 78) (*Italics supplied.*)

In *United States v. Schultetus*, 277 F.2d 322 (CA 5, 1960) in holding for the Government the Court said:

“We do not say that cases may not arise where the United States will be liable by reason of negligence of control tower operators for damages arising from the collision of aircraft. We are convinced that this is not such a case.” (277 F.2d 322 at 328)

In *Wenninger v. United States*, 234 F.Supp. 499 (D.C. Del. 1964) the contention was that the Federal Government was liable in not issuing a warning that heavy air transports were using a certain VOR approach. The decedent had flown his airplane into the wake turbulence created by one of the Air Force transports. The plane disintegrated and he was killed. The court held that there was negligence in failing to issue a warning but held that there was no evidence to show that issuing the warning would have caused the decedent to desist from making the flight and hence held that there was no causal connection between the failure to issue the warning and the accident. The case therefore stands for the principle that the United States can be held liable for the actions of its agents in connection with issuing warnings or giving clearances with respect to turbulence created by large aircraft.

The United States has cited the case of *New York Airways, Inc. v. United States*, 283 F.2d 496 (CA 2d,

1960) but that is not a case which holds that the Government could not be liable, it is simply a case which holds that the pilot employed by the plaintiff was contributorily negligent.

United States also cites the case *Hartz v. United States*, 249 F.Supp. 119 (D.C.Ga. 1965). In that case, a plane was cleared for takeoff from an intersection and crashed due to turbulence encountered from a preceding aircraft. We do not read the case as holding that the Government cannot be liable, but rather as holding that there was a failure to prove the allegations of the complaint.

A significant difference between the facts in the *Hartz* case and the facts in the instant case is that in that case both airplanes took off from the same runway, thus, there were prescribed separation standards in the ATM-2-A manual (Exhibit G-5). In our case the takeoff was from intersecting runways and as the Court found, and Garcia admitted, there were no separation standards prescribed in the manual and therefore the matter was one left to the discretion of the controllers. Moreover, in the *Hartz* case, as the Court noted:

“Although plaintiffs’ main claim of negligence has been the failure to maintain adequate separation, it should be remembered that Hartz’ request for an intersection takeoff contributed to a substantial shortening of the runway distance between himself and the preceding aircraft. Thus, instead of 7,860 feet, which would have been available, there was but 5,700 feet, but Hartz elected to take the intersection takeoff.” (249 F. Supp. at 126)

In the instant case, as the facts clearly demonstrate, the Piper Cub in question was, by orders from the tower, put down on the runway and held in the position from which it commenced its takeoff roll until cleared. Thus, it is apparent that in so far as the *Hartz* case can be said to be authority contrary to the decision reached by the Court below in the instant case, it is on the facts distinguishable.

The applicable statutes with respect to the purpose of air space control were the same in 1961 at the time of the accident as in 1958 when the Federal Aviation Act of 1958 was passed, 49 United States Code, Section 1348. The pertinent regulations (Exhibit G-1) also remained unchanged. The circular letter issued by the Government on February 17, 1955 (Exhibit P-24), states in part:

“In addition, the survey emphasized that control personnel must be constantly alert to detect situations which, if not promptly recognized and acted upon, could lead to the development of hazardous situations and possible destruction to life and property. . . . Under conditions of the type referred to above, and in any other condition where it is anticipated that turbulence could exist, *it is preferable that aircraft be delayed until it can be reasonably assumed that a hazardous situation no longer exists.* Lack of radio communication should not preclude the issuance of warning information to pilots since adequate light signal procedures exist for this purpose. Failure to recognize these potential hazards and to act accordingly can reflect on the judgment and efficiency of our facilities and defeats the

purpose for which air traffic control services are established." (Italics supplied.)

In December of 1955, in Aviation Safety Release No. 399 (Exhibit P-15) the Government described wing-tip vortices as "the greatest potential hazard, except actual collisions, to small aircraft flown in the vicinity of large airplanes." In 1956, the United States stated that it was still necessary for controllers to be constantly on the alert to detect situations which could develop into hazardous conditions with respect to wake turbulence (Exhibit G-14). On October 27, 1958, by circular letter (Exhibit P-26), the United States stated:

"Control personnel should continue to be alert to the possible hazards from thrust stream turbulence which may be anticipated, and to aid pilots through issuance of warning information *coupled with lengthened separation wherever thought advisable.*" (Italics supplied.)

Then, on December 29, 1959, by Exhibit G-15, the United States, without any change in the regulations, reversed its position and in effect told control tower operators that the separation standards contained in ATM-2-A were sufficient and that all they need do in the future was to issue a cautionary warning with the clearance.

This becomes especially significant when considered with the testimony of Garcia and Capellas that in their view they had no authority to withhold a clearance for takeoff and they would issue one to anyone, anywhere, anytime, regardless of the hazard involved

as long as it did not involve a hazard of actual collision with another aircraft (Tr. 250, 1105). Also significant in this area is the testimony of Carmody to the effect that where there are intersecting runways, a plane can be cleared even if it is only one hundred feet from the intersection facing toward it as soon as the plane on the other runway has cleared the intersection (Tr. 1366), and the testimony that the Government encouraged control tower operators to clear planes for takeoff at the earliest possible moment (Tr. 1367). As the Court below pointed out in its decision, the provisions for the designation of intersection takeoff points, had not been put into effect at Honolulu International Airport at the time of the accident in question, see Exhibit P-18, yet an intersection takeoff was cleared in the particular instance in the face of the provisions of Section 431.4 of the Air Traffic Control Procedures (Exhibit P-16-A) stating:

“Take-off clearance should normally be issued after the aircraft has taxied to the end of the runway-in-use or the run-up area adjacent thereto.”

There was nothing which prevented the Government from issuing adequate separation standards based on the technical knowledge in 1961, since as Professor Lissaman noted (Tr. 493) such standards had already been promulgated in the exhibits to the Bleviss Report (Exhibit P-38).

With respect to the authority of the control tower operators, the Government reversed its position in the

ATS Bulletin of November 15, 1962 (Exhibit P-39), and stated:

“You can avoid clearing a light plane for immediate takeoff behind a large aircraft, even though it will mean delaying traffic slightly.”

As the Court below noted this again was done without any change in the existing laws and published regulations, and it is therefore obvious that despite the denial of the fact by the witnesses for the United States, the control tower operators did have the authority to delay takeoff clearances until the turbulence should have subsided.

Obviously, the intersecting runway situation was more dangerous than the situation where the two aircraft were taking off from the same runway since in the intersecting runway situation, it would be necessary to cross both vortices at some time (Tr. 494). Yet it is precisely that situation for which no minima were prescribed as to the separation of aircraft and for which the Government's expert took the flat position that so long as the aircraft were clear of the intersecting runway by one hundred feet, it could be cleared as soon as the other plane had cleared the runway (Tr. 1366).

By the very regulations of the Government itself, it is obvious that the control tower operators, at all times, had the authority to delay takeoff clearances until turbulence had subsided. It is equally obvious that it was possible to promulgate adequate separation standards for intersecting runway situations and for turbulent situations.

Instead, having earlier advised the control tower operators to delay giving clearances, the Government had, at the time of the accident, reversed its position, stated that the existing separation minima (which did not apply to intersecting runways) were adequate, and that it was only necessary to issue warning information, and the Government had in fact put itself in the position of urging control tower operators to issue clearances at the earliest possible moment.

In the particular situation, if it can be said that Shima was negligent in taking off or allowing Furumizo to take off, it certainly can be said that the control tower operators were negligent in issuing the clearance. In fact, the clearance issued as worded, was almost an entrapment since it indicated that the takeoff would be safe if caution were exercised (see Exhibits P-5 and G-6).

The control tower operators put the aircraft in the position in which it was, held it there and cleared it from that point, realizing that the takeoff run roll would be started from that point. They saw the takeoff roll begin, they knew or should have known that it was an extremely dangerous takeoff, and they did nothing. In these circumstances, the Government of the United States is liable.

CONCLUSION

For the reasons stated above it is respectfully submitted that the judgment below as to the United States of America should be affirmed.

Dated, Honolulu, Hawaii,
July 1, 1966.

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ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK D. PADGETT



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 14 1967

UNITED STATES OF AMERICA AND
BAKER AIRCRAFT SALES, INC.,

Appellants and Cross-Appellees,

v.

BETTY K. FURUMIZO, ET AL.,

Appellees and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

REPLY BRIEF FOR THE UNITED STATES

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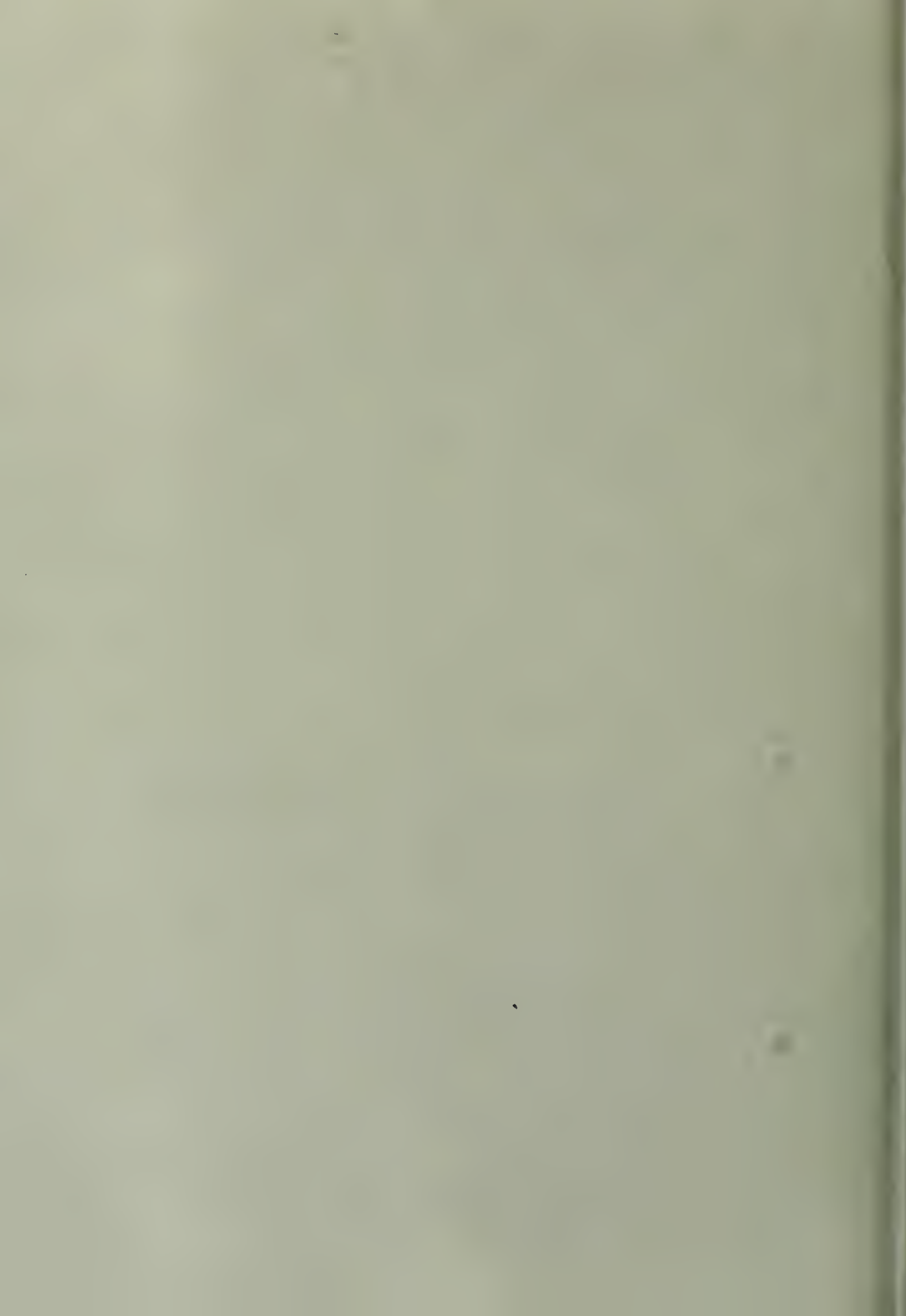
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,641

UNITED STATES OF AMERICA, AND
BAKER AIRCRAFT SALES, INC.,

Appellants and Cross-Appellees,

v.

BETTY K. FURUMIZO, ET AL.,

Appellees and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

REPLY BRIEF FOR THE UNITED STATES

In our main brief we demonstrated that the Federal Aviation Agency (FAA) Tower Controllers were not negligent in the performance of their duties at the Honolulu Airport at the time of the accident involved in this litigation. We also showed in that brief that, even assuming such negligence, the supervening negligence of Baker Aircraft's flying instructor was the sole proximate cause of the accident. While nothing in the appellees-cross appellant's brief or Baker Aircraft's answering brief to our main brief

refutes the Government's position, we now turn to certain additional points raised in those briefs.

1. Throughout their brief (pp. 18-30), appellees and cross-appellants have attempted to characterize this appeal as one questioning primarily the district court's resolution of factual questions. Appellees thus dwell at great length on factual questions relating to the standard of care the Government (through its air traffic controllers) was allegedly supposed to exercise in relation to the decedent Furumizo.

Discussion of these factual matters relating to standard of care is quite beside the point for before such matters may become relevant a legal duty owing to the decedent must be found to exist. The existence of such a duty is clearly a question of law, and, as we demonstrated in our main brief (pp. 23-24), the district court erred in holding that the controller owed a duty to the decedent to delay issuance of a takeoff clearance in this case.

No such duty can be gleaned from the Air Traffic Manual (ATM - 2 - A) in use at the time of the accident. To the contrary the controllers, by following this "bible for tower operators" (United States v. Miller, 303 F. 2d 703, 710 n. 16), in clearing the Piper for takeoff with an appropriate warning regarding turbulence in its flight path, were acting in full accordance with Civil Air Regulations having the force of

law. 14 C.F.R. 26.26 (1961 Rev.).

Nevertheless, the district court concluded that the manual aside, the controllers should have foreseen that an experienced flight instructor might be unaware of the nature of a fundamental rule of the road, i.e., that a clearance to takeoff is permissive and not mandatory, and that such an experienced instructor would simply disregard the known danger of turbulence. Appellees attempt to support this conclusion by the simple expedient of stating that the evidence was in conflict as to whether pilots generally were aware of the permissive nature of takeoff clearances. (Brief, p. 26). But the fact that some pilots may have been unaware of this fundamental rule of the road at the time of the accident provides no basis for a conclusion that the controllers should have anticipated that flying instructor Shima would be so unaware.

The existence of a duty involves foreseeability by the alleged tortfeasor of the risk of harm arising from his conduct to the party injured. Restatement of Torts 2d § 281, Comment c. It is the knowledge or reasonable belief of the

alleged tortfeasor that is significant. Thus, the fact that some pilots may have been ignorant of the permissive nature of takeoff clearances provides no evidence that the air traffic controllers were aware of any such ignorance on Shima's part. As our main brief shows (pp. 24-26), the evidence of record on this question is to the contrary. Thus, the district court's conclusion that the controllers should have anticipated flying instructor Shima's reckless conduct is without support and its holding--as to the existence of a duty on the part of the controllers to the decedent Furumizo to delay takeoff clearance--must therefore fall.

2. As we demonstrated in our main brief (pp. 20-21), assuming for purposes of argument that the air traffic controllers were negligent in clearing the Piper for takeoff when they did, the later negligence of flying instructor Shima in immediately taking off without heed to the controllers' warning of turbulence intervened to break the chain of causation established by the assumed negligence of the controllers. Clearly, at the time of the assumed negligence, the tower personnel could not foresee that Shima, a highly experienced pilot and flying instructor, would recklessly disregard their explicit warning concerning turbulence in his takeoff path.

However, both appellees and appellant Baker Aircraft argue that Shima's negligence was foreseeable since the evidence showed that after giving the takeoff clearance, the controllers saw Shima takeoff and did nothing to prevent this (Brief for appellees, pp. 41-42; Answering Brief of Baker Aircraft, p. 12). In effect, appellees and appellant Baker Aircraft are suggesting that the controllers had the "last clear chance" to prevent the accident. The short answer to this argument is that there is absolutely nothing in the record which even remotely suggests that in very few seconds between the time the pilot recklessly started to take-off and his point of no return the controllers could have acted to prevent the takeoff.

3. Appellees and cross-appellants on their cross-appeal complain that they were not awarded adequate damages as against both the United States and Baker because of certain alleged errors committed by the district court. (Brief pp. 39-63).

a. The first alleged error is the district court's failure to take into account future possible inflation, with a consequent depreciation in the purchasing power of the dollar, throughout the period of the decedent's life expectancy, i.e., through the year 2003. But this con-

sideration is speculative and conjectural and it was therefore entirely proper for the district court to ignore it.

b. Appellees and cross-appellants also claim that they should have been awarded prejudgment interest from the date of decedent's death. But, as to the United States, it is clear that the Federal Tort Claims Act expressly bars any award of prejudgment interest. 28 U.S.C. 2674; Van Wie v. United States, 77 F. Supp. 22, 50 (N.D. Iowa).

c. Appellees and cross-appellants further argue that the district court should not have deducted estimated future federal income taxes from decedent's anticipated future earnings. The deduction, however, fully accords with decisions of ~~this~~ Court and other courts in confining damages to actual loss. Southern Pac. Co. v. Guthrie, 186 F. 2d. 926 (C.A. 9), certiorari denied 341 U.S. 904, reaffirming on rehearing 180 F. 2d 295 (wherein this Court said "We think, however, that for the expected period of Guthrie's life, he would have found taxes fully as certain as his prospect of continued earnings.")¹/; O'Connor v. United States, 269 F. 2d 578 (C.A. 2); Moffa v. Perkins Trucking Co.,

¹ / 180 F. 2d. at 302.

200 F. Supp. 183 (D. Conn.); Floyd v. Fruit Industries, Inc., 144 Conn. 659, 136 A. 2d 918; British Transport Comm. v. Gourley [1956] A. C. Law Rep. 185. See United States v. Sommers, 351 F. 2d 354, 360 (C.A. 10). See also Wright, Foreword, Damages for Personal Injuries, 19 Ohio S.L.J. 155, 157.

In any event, insofar as the Government may be liable for damages here, there can be no doubt that future estimated income taxes must be deducted from lost estimated future earnings. For as the Second Circuit stated in O'Connor v. United States, 269 F. 2d 578, 584-585:

The compensatory nature of the right to damages under the Tort Claims Act requires such consideration of Federal Income Taxes; the plaintiff-appellee can recover only for losses sustained.

See also dissenting opinion of Moore, J. in Cunningham v. Rederiet Vindeggen, A/S, 333 F. 2d 308, 317 (C.A. 2).

Cf. United States v. Hayashi, 282 F. 2d 599, 603 (C.A. 9). ^{2/}

e. Two other claimed errors merit only very brief comment. First, appellees and cross-appellant's contention to the contrary notwithstanding, (Brief pp. 59-61), the district court did personally evaluate the loss to appellee Betty Furumizo of her husband. That the court tried to put itself "in the place of average citizens and jurymen" in making the award of general damages was not an abdication of

^{2/} Cross-appellants rely on Kawamoto v. Yasutake, 410 F. 2d 976 (Haw.) to support their position that prospective federal income taxes may not be considered. But that case only deals (Footnote continued)

its judicial responsibilities. Rather it involved an effort by the court to arrive at a realistic valuation of the wife's loss, and thereby exercise its judicial discretion in a reasonable manner.

Second, appellees and cross-appellants lift the court's description of decedent's wife out of context to support their assertion that the award of general damages to Mrs. Furumizo (\$50,000) would have been higher but for the court's consideration that she was young, healthy, well-educated and attractive with prospects for remarriage (R. 610). But in noting these qualities the trial court was only indicating that she had less need for physical attention and moral encouragement than did someone like Mrs. Hayashi, a bedridden paralytic, who was awarded \$72,200 in general damages for the loss of her husband. See United States v. Hayashi, 282 F. 2d 599 (C.A. 9). And it is only reasonable to conclude (as did the district court here) that where the dependence on the decedent for love, understanding and physical help is less, the loss is less.

CONCLUSION

For the reasons stated herein and in our main brief, it is respectfully submitted that the judgment of the district court should be reversed and the cause remanded to the

2/ (Footnote continued) with the question of the propriety of the trial court's refusal to instruct the jury that its award of damages (in contradistinction to its computation of damages) was not subject to current federal or state income tax levies.

istrict court with directions to enter judgment for the
nited States.

J. WILLIAM DOOLITTLE,
Acting Assistant Attorney General,

HERMAN T. F. LUM,
United States Attorney,

MORTON HOLLANDER,
HARVEY L. ZUCKMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

OVEMBER 1966.

CERTIFICATE OF COMPLIANCE

I hereby certify that, in connection with the preparation of this reply brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Harvey L. Zuckman
HARVEY L. ZUCKMAN,
Attorney,
Department of Justice,
Washington, D. C. 20530.

FEB 14 1967

No. 20643 ✓

In the

United States Court of Appeals
for the Ninth Circuit

GILA RIVER RANCH, INC., a corporation, and
RUSSELL BADLEY and CELESTE BADLEY,
Appellants,

vs.

UNITED STATES of AMERICA,

Appellee.

On Appeal from the United States District Court

Appellants' Opening Brief

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CELESTE BADLEY, Appellants*



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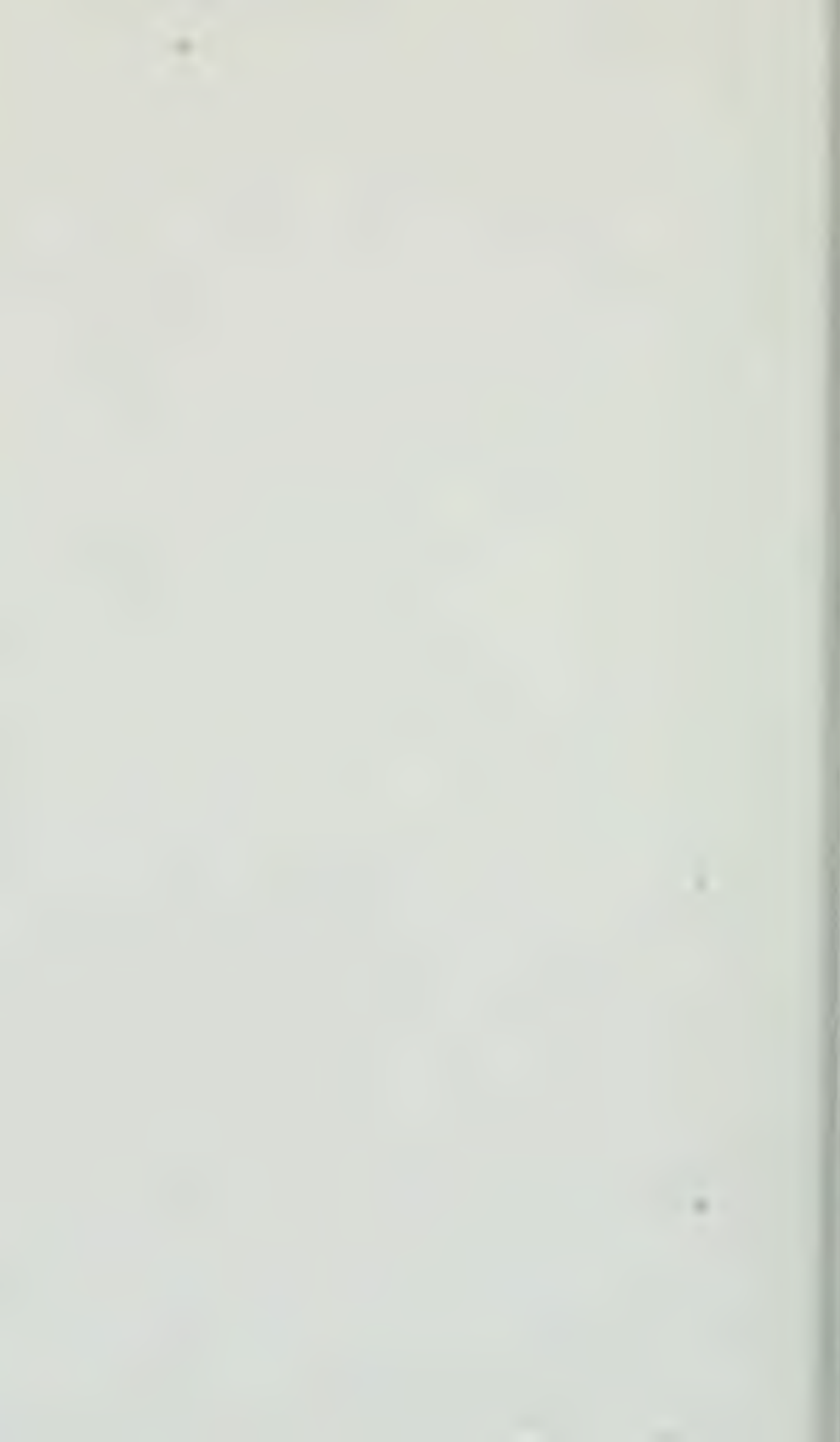
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No. 20643

In the

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GILA RIVER RANCH, INC., a corporation, and
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Appellants,

vs.

UNITED STATES OF AMERICA,

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On Appeal from the United States District Court

Appellants' Opening Brief

JURISDICTIONAL STATEMENT

This is a direct appeal from the Judgment entered on the 16th day of November, 1965, by the United States District Court for the District of Arizona approving the government's application or Motion for Judgment or Remittitur. The underlying action was brought by the United States of America, plaintiff, to condemn a flowage easement over certain tracts of land lying in the County of Maricopa, State of Arizona, and within said District of Arizona. The action is a civil action brought by the United States of America at the request of the Secretary of the Army for the taking of property under power

of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest. The authority for the taking is the Act of Congress approved February 26, 1931, 46 Statutes 1421, U. S. Code 258(a), and the acts supplementary thereto and amendatory thereof, and under the further authority of the Acts of Congress approved April 24, 1888, 25 Statutes 94, 33 U. S. Code 591, and March 1, 1917, 39 Statutes 948, 33 U. S. Code 701, which authorized the acquisition of land for flood control projects; the Acts of Congress approved May 17, 1951, Public Law 81-516 which authorizes the construction of the Painted Rock Dam and Reservoir in the Gila River Basin, Maricopa County, Arizona; and the Act of Congress approved September 2, 1960, Public Law 86-700, which appropriated funds for such purposes. This court's jurisdiction is based upon the Notice of Appeal filed by Russell Badley and Celeste Badley through their attorneys of record, GUST, ROSENFELD & DIVELBESS, on the 17th day of December, 1965. Said Notice of Appeal is timely. Accordingly this Court's jurisdiction rests upon 28 U. S. Code, Section 1291.

STATEMENT OF FACTS

1. This appeal deals solely with the events and orders accruing subsequent to the jury's verdict. However, a portion of the facts which are vital to this defendant's appeal took place prior to the verdict. They will be set forth. All facts are fully set forth and supported by the Transcript of Record and a Reporter's record of the trial is not a necessary portion of this appeal and is omitted.

2. The instant suit arose as a part of the construction of the Painted Rock Dam located in Maricopa County, Arizona, under the Act of Congress of May 17, 1950 (PL81-516) and of September 2, 1960 (PL86-700), which acts authorized the project and appropriated the fund for construction and con-

demnation. This suit deals with the plaintiff's taking of the flowage easement (See Transcript of Record 1, Page 1, Complaint).

3. Two concurrent actions were filed and later consolidated. They were cause number 3586-Phx. and 4571-Phx., all in the District Court for the State of Arizona. Although consolidated, this appeal deals entirely with the proceedings in Civil 3586, now docketed as case number 20643 U. S. Court of Appeals.

4. The parties to this suit will herein be referred to as follows: UNITED STATES OF AMERICA as plaintiff or government; GILA RIVER RANCH, INC., as Gila; and RUSSELL and CELESTE BADLEY as Badleys or Badley.

5. The facts accruing prior to the verdict are set forth in chronological order:

(1) On July 6, 1961, Badleys and Gila entered into an agreement whereby Gila was *to sell* and Badleys to purchase certain land in Maricopa County, Arizona (See contract at page 71, Transcript of Record).

(2) On March 23, 1961, plaintiff filed its Notice of Taking and its Complaint. A portion of the flowage easement taken lying in Tract No. C-314-E was identical to the description of the land Gila had agreed to sell Badleys.

(3) On December 9, 1961, disbursement of funds paid into the registry of the court under 40 U.S.C.A. 258A were withdrawn by the following parties in the following amounts:

F. A. Gillespie & Sons Co.	489,940.00
Connecticut Mutual Life Insurance Company	100,000.00
O. L. Bane	1,000.00

(See Transcript of Record, Document 39, Proceedings, Page 106)

(4) On July 25, 1962, Gila and Badleys closed the purchase agreement "with the understanding that an equitable

adjustment would be made by Gila to Badleys representing their (Badleys') share of the proceeds of the award." The sale price decided between these parties was to be \$136,152.50. See Transcript of Record, Document 21, page 71.

The Badleys were never mentioned in the Complaint (Document No. 1, *supra*), the Order for Delivery (Transcript of Record, Document No. 2, page 131), or the Notice of Condemnation (Transcript of Record, Document No. 5, page 15), and the record shows that prior to trial the Badleys made no appearance in the action. Appearances, however, were made by Gila, Connecticut Mutual Life Insurance Company, Maricopa County, and Mountain States Telephone and Telegraph (See Transcript of Record, Document 39, pages 104-109) and the record also shows Badleys first entered an appearance on November 18, 1964 (Transcript of Record, Document 39, Proceedings, page 109) after the trial had begun.

Trial on the consolidated cases began on November 16, 1964, the transcript of record shows the first appearance of Badleys on November 18, 1964.

Verdict was rendered by the Jury on November 27, 1964 and judgment thereon dated January 29, 1965, entered February 1, 1965. The verdict was in the sum of \$1,132,000.00, interest on the award was added under the Notice of Taking Act 40 U.S.C.A. 258A. The plaintiff filed its motion for new trial on the 8th day of February, 1965, praying for a new trial based upon the allowance of certain evidence offered by Gila.

Plaintiff's motion for new trial dated February 8, 1966, was chiefly based upon the grounds that testimony tendered by Gila River Ranch, Inc. was incompetent. See paragraphs 4, 5, 6 and 7, plaintiff's motion for new trial (Transcript of Record, Document 13, pages 36-38). No part of the motion for new trial is directed to the defendants Badley and there is no evidence that the motion was ever directed to the Badleys.

On May 28, 1965, the court ordered a remittitur in lieu of a new trial. Portions of the Memorandum Decision of May 28th state as follows:

"Mr. Griffen had no knowledge of farm values in and around Gila Bend, Arizona, . . . His testimony was not permitted on that theory, but the court stated that he stood in the same position as a private owner of property and could testify without prior knowledge of values in view of his official capacity . . . I am now of the opinion Mr. Griffen's testimony was improperly admitted and the instruction error." (citing cases)

The court goes on to say:

"The jury view does not have the force and effect of informed testimony of experts . . .

"The verdict should be reduced in cause number 3586 in the amount of \$125,000 and in cause number 4571 in the amount of \$800. If the defendant landowner within 30 days from filing of this opinion will file a stipulation to accept judgments upon the verdicts in the two cases reduced by the above amount then the motion for new trial will be denied, otherwise the motion will be granted."

Thereafter, remittitur was filed on behalf of *Gila and Badleys* by attorney of record Mark Wilmer. See Transcript of Record, Document 15, pages 43-45. No other parties agreed to or made a remittitur.

Thereafter, plaintiff filed its motion for new judgment on September 10, 1965, requesting **full remittitur from both Gila and Badleys**. A portion of the proposed judgment stated as follows:

"Since the total amount of \$1,250,887.75 has heretofore been deposited into the registry of the court, it is ordered that the defendants Gila River Ranch, Inc. and Russell Badley and Celeste Badley refund into the registry of the court, the amount of \$153,125.00 . . ." See Judgment on Remittitur, Transcript of Record, Document 23, page 80.

Badley and Gila filed separate objections to the motion for judgment on remittitur, See Transcript of Record, Document 20, page 55-66 and Document 21, pages 67-73.

On the 16th day of November, 1965, the court entered its order on plaintiff's Motion for Judgment and rendered judgment thereon. A portion of the order states as follows:

"Defendants Badley object to a judgment against them for the full amount of the refund. From the record and *copy of agreement attached to the memorandum* of counsel for defendant Badley, it is agreed that they received \$52,000.00 of the award of \$1,132,000 in cause number Civ. 3586-Phx. The payment to them was 4.6% of the principal award and the refund by them should be in the same proportion. I have interlined at the end of the first paragraph on page three of plaintiff's proposed judgment the following:

The joint and several liability of the defendants Badley is limited to \$7,043.75 or 4.6% of amount to be refunded."

The judgment on remittitur entered the 16th day of November, 1965, contains the same words as set forth in the order of the 16th of November, 1965, See Transcript of Record, Document 23, at page 80.

Thereafter, Badleys filed notice and perfected their appeal in the regular fashion.

STATEMENT OF THE CASE

This appeal is made by Russell and Celeste Badley, "Appellants," from the Order and Judgment entered on the 16th day of November, 1965, which contained the following order:

"It is ordered that the defendants Gila River Ranches, Inc., and Russell Badley and wife Celeste Badley refund into the registry of this court the amount of One Hundred Fifty-Three Thousand, One Hundred Twenty-Five and No/100 Dollars (\$153,125.00) and

that upon its deposit the Clerk of this Court shall issue a check therefor payable to the Treasurer of the United States Attorney's Office, Phoenix, Arizona. The joint and several liability of the defendants Badley is limited to Seven Thousand, Forty-Three and 75/100 Dollars (\$7,043.75) or 4.6% of the amount to be refunded."

The full statement of the position of the appellants, Russell and Celeste Badley, is as follows:

1. That if the said appellants Russell and Celeste Badley are liable to the United States Government by reason of the Order to Remit as above stated, the liability of these appellants has been incorrectly apportioned.

2. That it is the position of these appellants that the Memorandum of Decision of the United States District Court for the District of Arizona made on the 28th day of May, and filed on the 1st day of June, 1965, does not order these appellants to remit any sums whatsoever.

3. That is the position of the appellants Badley that there is no basis for the Order of the United States District Court entered on the 16th day of November, 1965, in which these defendants were ordered to remit the sum of Seven Thousand, Forty-Three and 75/100 Dollars (\$7,043.75) to the Clerk of the District Court.

SPECIFICATION OF ERRORS

1. That the court erred in the mathematical calculation of the sum to be remitted by appellants Badley: That at the most said remittance should have been Five Thousand, Seven Hundred Fifty Dollars (\$5,750.00) instead of Seven Thousand, Forty-Three and 75/100 Dollars (\$7,043.75).

2. That the court erred in the mathematical calculation of the sum to be remitted by appellants Badley: That said remit-

tance should have been \$1,579.05 instead of Seven Thousand Forty-Three and 75/100 Dollars (\$7,043.75). (This assignment is alternative to Assignment of Error No. 1)

3. That the court erred wherein it ordered the appellants Badley to remit the sum of Seven Thousand, Forty-Three and 75/100 Dollars (\$7,043.75) — for these appellants should not be required to remit any sums whatsoever.

QUESTIONS PRESENTED

1. What is the proper mathematical calculation of one condemnee's portion of a remittitur when that condemnee received only a small portion of the award and received no interest on said award?

2. Where the court orders remittitur in lieu of a new trial on a condemnation award and does not specify a certain claimant as one who is to pay a portion of the remittitur and where the primary awardee is clearly named, can court later order remittitur from that person not named in the original order for remittitur?

3. Can one awardee agree to assign a portion of its award to another awardee and if so, can the assignee be subject to remittitur after withdrawing the share assigned?

4. Does a person who agrees to buy land on an executory contract — where the contract is executed prior to the date of the Declaration of Taking (40 U.S.C.A. 258a) but where the sale is not closed until after Declaration of Taking — take his share of the award directly or his share taken *through* the vendor?

SUMMARY

The position of these appellants is as follows:

1. The court incorrectly calculated the amount these appellants are to remit. The basis here is solely one of mathematics. The Badleys received the award of Fifty-Two Thousand Dollars (\$52,000.00), which is 4.6% of One Million, One Hundred Thirty-Two Thousand Dollars (\$1,132,000.00), but Badleys did not share in the interest. Now on remittitur they should only remit 4.6% of One Hundred Twenty-Five Thousand Dollars (\$125,000.00) (the reduced verdict, not considering the interest).

2. That the fairer and better way to consider the Badley's share of remittitur would be to take into consideration the difference between the verdict of One Million, One Hundred Thirty-Two Thousand Dollars (\$1,132,000.00) and the final sum of the award ultimately awarded One Million, Ninety-Seven Thousand and No/100 Dollars) (\$1,097,000.00) and apportion 4.6% of that as Badleys' share.

3. That there is no basis for the Badleys to remit any sums whatsoever for two good reasons: (1) The court never ordered the Badleys to remit instead of facing a new trial. There were several others who shared in the sums deposited into court along with Gila and Badley, however, that order only referred to one landowner, after first describing the reasons for the remittitur – which were the fact that Gila's president was allowed to testify as to the value of the property. The order never specifically ordered Badleys to remit and cannot be so construed – neither did it order other recipients of the award to remit – and having not been ordered to remit at the first instance a later order to remit must be a nullity. (2) The Badleys were not primary recipients of the award. That is to say, they took their share not directly but through the award and then only by way of separate settlement. As such, Badleys were one

step removed from the award and should not remit — the full remittitur should fall on the primary recipient Gila.

Specifications of Error No. 1

That the court erred in the mathematical calculation of the sum to be remitted by appellants Badley: That at the most said remittance should have been Five Thousand, Seven Hundred Fifty Dollars (\$5,750) instead of Seven Thousand, Forty-Three and 75/100 Dollars (\$7,043.75).

ARGUMENT

The sole basis of this assignment is that the court erred in the mathematical calculation of the remittitur as far as it affects the appellants Badley. The crux of this assignment is that even if Badleys are liable to remit (which we contest in Assignment No. 3) the amount of the remittitur is incorrect as the court forced Badleys to remit interest they never received.

The agreement wherein Gila and Badleys reached an accord on the share which Badleys received states:

“The amount of damages for such taking has now been fixed at One Million, One Hundred Thirty-Two Thousand Dollars (\$1,132,000).”

And at Paragraph F:

“The parties have now agreed that Badleys’ share of *such* award is \$52,000.00 (including the amount previously credited) which amount will be paid to Bradleys and paid by them to Gila to be credited on the Promissory Note of Badleys to Gila as hereinafter set forth.” Transcript of Record, Document 21, Page 72) Emphasis Added.

This is the agreement which the parties agreed to divide the award, and is the basis for the court’s decision as to the Badley portion. Badleys agree that the relative percentage of 4.6%

constitutes Badleys' relative share of the verdict when no interest is added, however, the order to remit causes Badleys to remit 4.6% of One Hundred Fifty-Three Thousand, One Hundred Twenty-Five Dollars (\$153,125.00). The remittance should be 4.6% of One Hundred Twenty-Five Thousand Dollars (\$125,000.00) as Badleys never received any of the interest added to the verdict to form the judgment; as such, they should not so remit.

Specifications of Error No. 2

That the court erred in the mathematical calculation of the sum to be remitted by appellants Badley: That said remittance should have been \$1,579.05 instead of Seven Thousand Forty-Three and 75/100 Dollars (\$7,043.75) (This Assignment is alternative to Assignment of Error No. 1)

ARGUMENT

In this assignment of error the appellant submits that the court erred in its final calculation of the amount of the Badleys' remittitur. This contention is based upon the following:

That the agreement to assign a portion of the award to Badleys was based only on the verdict. That is to say Badleys were to receive an equitable share of the proceeds of the award. However, the Badleys and Gila River Ranch, Inc. agreed the amount of the verdict was to be used as a basis in the contract and the basis of the Badleys' share. The "equitable settlement" was based upon an award of One Million, One Hundred Thirty-Two Thousand Dollars (\$1,132,000). Of this sum the Badleys received Fifty-Two Thousand Dollars (\$52,000.00) or 4.6%. The final award in the judgment on remittitur comes to the sum of One Million, Ninety-Seven Thousand, Seven Hundred Sixty-Two and 75/100 Dollars (\$1,097,762.75). Applying the relative percentage of 4.6 to the difference between the

award upon which the Badleys' share is based and the final award, we come to the following results:

\$1,132,000.00	(Basis of Badleys' award)
1,097,762.75	(Final award)
<hr/> 34,237.25	(Difference between verdict and final award)
4.6%	Relative percentage
1,579.05	Remittitur

The basis of this contention is that if there ever was a separate award to the Badleys (and the Badleys for reasons set forth in assignments of errors number 3) vigorously contend that no separate award was ever made to them), the award in the sum of Fifty-Two Thousand Dollars (\$52,000.00) did not take into consideration the amount of interest which would also be due on that portion of the full award. The Badleys are entitled to, but never got, this interest. The Notice of Taking Act, Section 40-258(a), U. S. Code, states as follows:

"... Upon the filing said Declaration of Taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said land shall be deemed to be condemned and taken for use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceedings and established by judgment therein and said judgment shall include as part of the just compensation awarded, interest at the rate of 6% per annum on the amount *finally awarded* as the value of the property as of the date of taking, from said date to the date of taking; but interest shall not be allowed on so much thereof as shall have been paid into the court.

No sums so paid into the court shall be charged with the commissions or poundage." Emphasis Added.

Under the original withdrawal the Badleys' share was based only on a percentage of the judgment awarded to them. As such the Badleys were never awarded or never shared in the interest as is contemplated by Section 40-258(a), nor can they now as the funds have been fully paid out of the court registry. Badleys had a right to receive interest on their award. Now that the award has been finally awarded the total amount of the award comes to One Million, Ninety-Seven Thousand, Seven Hundred Sixty-Two and 75/100 Dollars (\$1,097,762.75). The court is in effect rewriting the agreement between Gila and Badleys by taking a share of that agreement from Badleys. As such it should make every equitable attempt to pay the Badleys the interest due them and as the interest cannot be paid by award, their portion of the remittitur should be reduced correspondingly. The Badleys should now have to remit only their fragmentary percentage of the difference between the award on which their assignment is based and upon the amount of the final award. The final sum to be remitted should be calculated at 4.6% of Thirty-Four Thousand, Three Hundred Twenty-Seven and 25/100 Dollars (\$34,327.25) equalling One Thousand, Five Hundred Seventy-Nine and 5/100 Dollars (\$1,579.05).

Specifications of Error No. 3

That the court erred wherein it ordered the appellants Badley to remit the sum of Seven Thousand, Forty-Three and 75/100 Dollars (\$7,043.75) — for these appellants should not be required to remit any sums whatsoever.

ARGUMENT

This assignment is based in part upon the contention that the motion for new trial never affected these appellants and the order for remittitur made by the court never ordered these

appellants to remit. The motion for new trial, Transcript of Record Document 13, Pages 36-39, is chiefly based upon the competency of the testimony of Russell Griffen, President of the defendant corporation (Gila River Ranch, Inc.). The court's attention is called to the fact that the government's motion for new trial is based upon testimony of persons testifying for Gila and not for Badleys. The Badleys were never mentioned in the motion for new trial and it is interesting to note that the motion for new trial was not even directed to these appellants. Note the endorsement at page 39:

"Copy hereof mailed this 8th day of February, 1965,
to:

Messrs. Snell and Wilmer
400 Security Building
Phoenix, Arizona 85004

Attorneys for defendants,
Gila River Ranch, Inc. and the Connecticut
Mutual Life Insurance Co.

/s/

Richard S. Allemann,
Assistant United States Attorney."

The motion, however, was directed to Connecticut Mutual Life Insurance Company who also took a portion of the award. See Transcript of Record, Doc. 39, Page 106, notation of December 8 and 9, 1961. Thus, the query is: Did the government ever move for a new trial as far as the Badleys were concerned? If so, did the government move for a new trial against Connecticut Mutual Life Insurance Company? In light of the Memo Decision, Document 14, pages 40-42, the answer to both of the above questions must be in the negative. The Memorandum Decision ordering remittitur in lieu of new trial no more relates to the Badleys than it does to Connecticut Mutual or to O. L. Bane or to F. A. Gillespie & Sons Company, all of

whom share in the award along with Gila and Badleys. The order ordering remittitur or in the alternative thereof a new trial states as follows:

“ . . . Defendant’s counsel argues that the president of the defendant corporation has been shown to possess knowledge of the farm and farm values and was qualified to state an opinion of value beyond the general qualification of his official capacity . . . Here Mr. Griffen had no knowledge of farm values in and around Gila Bend or in Arizona. His testimony was not permitted on that theory but the court stated that he stood in the same position as a private owner of property and could testify without prior knowledge of values in view of his official capacity.”

The Court goes on to say:

The verdict should be reduced in cause number 3586 in the amount of \$125,000 and in cause number 4571 in the amount of \$800.00. If the *defendant landowner*, within 30 days from filing of this opinion will file a stipulation to accept judgments on the verdicts in the two cases reduced by the above amounts . . .”

Emphasis Added

The Memo Decision deals with the testimony of Mr. Russell Griffen, an officer of the defendant Gila River Ranch, Inc. There is no showing that Mr. Griffen in any way affected the jury as to the valuation of the Badley’s land if the Badleys’ land is separate and apart from the Gila land and there is no mention here of this. The memo opinion relates only to a defendant landowner mentioned in the singular and again one who may file a stipulation in both actions. The Badleys were not a party to cause number 4571, and could not agree to remit \$800.00 in that action. However, Connecticut Mutual Life Insurance Company, O. L. Bane and The Gillespie Irrigation Co. were parties to the actions and received a portion of the award, however, they were not mentioned in this order and were never required to remit. It is submitted that the only construc-

tion of the Memo Decision of the 28th of May, 1965, could be to the effect that there was only one "landowner" — Gila River Ranch, Inc. — who was to remit the full sum of the remittitur. The Badleys not being ordered to remit cannot now be held to do so even in light of the remittitur filed jointly by Badleys and Gila River Ranch, Inc. through their then attorney of record, Mr. Mark Wilmer. See Transcript of Record, Document 15, at pages 43-45. As a further portion of this assignment of error it will be noted that it is Appellants' position that it was not a landowner at the time of taking. The agreement between Gila River Ranch, Inc. and Russell and Celeste Badley as shown in Transcript of Record, Document 21, pages 71-73, show that on the 6th day of January, 1961, Gila River Ranch, Inc. and Badleys entered into an agreement for the purchase of certain land. Further that the government's Declaration of Taking was filed on March 23, 1961, and third that the purchase agreement was closed on July 25, 1962, after the notice and declaration of taking had been filed. It is the Badleys position that the person entitled to compensation is the owner of the property at the time of the filing of the declaration of taking. See *United States vs. Miller*, 1943, 317 U. S. 369, 63 S.Ct 276, 89 L.Ed 336, 147 A.L.R. 55. That all others who claim an interest in that land have their claim converted to a claim against the award to be paid to the landowner and the landowner is the primary recipient subject only to the claims which may exist against the property at the date of taking. See *United States vs. Alberts*, 59 Fed. Supp. 298. As such the defendant Badleys were not landowners, as their contract to purchase was not final, just as the purchase was not final in *Alberts*, supra, and not being landowners, were not the parties who were ordered to remit in the court's order of the 28th day of May, 1965.

There is another theory which appellants submit bars the Badley remittitur. This contention is that these appellants were only assignees of a portion of the award, to wit: Fifty-Two Thousand Dollars (\$52,000). That this assignment was a por-

tion of a separate agreement made separate and apart from any portion of the instant condemnation action whereby in the sales agreement of July 25, 1962, and in the finalization agreement dated February 13, 1965, the Badleys and Gila River Ranch, Inc. that Gila would "assign to the Badleys" Fifty-Two Thousand Dollars (\$52,000) of the award. That as such assignee Badleys took *through* Gila River Ranch, Inc. and not directly from the plaintiff, and that any remittitur that must be taken must be taken from that person who received the original award. Herewith the Badleys were not the primary recipients of the award. The Badleys received Fifty-Two Thousand Dollars (\$52,000) as a portion of the side agreement which is separate and apart from any portion of this lawsuit. It is the Badleys' contention that this agreement to assign a portion of the award states what is the applicable law under the circumstances. A quick review of the facts will show that on January 6, 1961, Badleys and Gila River Ranch, Inc. signed an agreement whereby Badleys were to buy a certain portion of Gila's land. Gila remained the owner of the land subject only to the Badleys' claim to purchase it in futuro. The government took the flowage easement, a portion of the land upon which the Badleys were to purchase on March 23, 1961. On July 25, 1962, not having the full land with which it had agreed to sell Badleys (the flowage easement having heretofore been taken and thus removed), Gila and Badleys agreed that the Badleys' claim to the land which had been taken by the government would be shifted and converted into a claim against the award to be awarded on the flow easement. See Recital 3 in the agreement of February 13, 1965, Transcript of Record, Document 21, at page 71, which states as follows:

"On July 25, 1962, the transaction contemplated between the parties was closed with the understanding the equitable adjustment would be made by Gila in favor of Badleys, representing their share of the proceeds of the condemnation. As a part of the closing

Badleys executed and delivered to Gila a Promissory Note in the principal sum of \$126,152.50 payable in ten equal annual installments commencing July 25, 1963, with interest on the unpaid principal balance at the rate of 6% per annum, payable annually at the same time and in addition thereto. The payments due on July 25, 1963, and July 25, 1964, have been timely made."

After the final verdict had been arrived at by the jury, Badleys and Gila settled all claims on the flowage easement by the contract of February 13, 1965. By this contract the Badleys received an assignment of the Gila claim against the United States Government in the sum of Fifty-Two Thousand Dollars (\$52,000), taking the \$52,000 and then returned it to Gila and receiving credit therefor. In this effect the Badleys were recompensed by Gila for the loss of the flowage easement which Gila could not deed to Badleys. It is this appellants' contention that all of the law relative to this action is set forth in the case of *United States vs. Alberts*, 50 Fed. Supp. 298, wherein the court says at page 299:

"The determination of the person entitled to compensation must be made as of October 5, 1943, the date of the filing of the declaration of taking. For the reason that compensation is due at the time of taking the owner at that time, not the owner at any earlier or later date, *receives the payment.*" *Danforth vs. United States*, 308 U.S. 271, 284, 60 Supreme Court 231, 236, 84 Law. Ed 240. "The award stands in the place of the property." *Washington Water Power vs. United States*, 9th Circuit 135 Fed. 541.

At page 300 the court concludes:

"From the foregoing it will be seen that defendant Holden is entitled to such compensation as may be awarded for this property subject to the taxes, assessment and other liens which may exist against the property on the date of the filing of the declaration of taking."

The award goes to the owner of the property at the date of the declaration of taking, subject to whatever claims any other persons may have against the property. As such in this case the award went directly to Gila River Ranch, Inc. for only Gila River Ranch, Inc. was the owner of the property as of the date of the declaration of taking.

Under the terms of Section 258 (a), Title 40, U.S.C.A., the compensation for the taking of the property shall vest in the "persons entitled thereto" and said compensation shall be ascertained and awarded in said preceeding and established judgment. The judgment in this action merely established the fact that the land was taken and the award made. See Transcript of Record, Document 11, pages 31-33. The judgment contains no specific award to any specific party. The parties may have had the right to have the amount of the award determined by the court under Section 258(a) U.S.C., however, they should also be able to divide the proceeds as they see fit so long as the distribution is not illegal for the parties certainly have the right to make a private agreement in place of the court's apportioning of the award. Badleys stood only as a claimant to a portion of the land. Once the land was taken the Badleys' claim converted into a claim against the fund. The claimant to the land could only have a claim to the final award if the court ultimately awarded that award to the true landowner, in this instance Gila River Ranch, Inc. Had someone else owned the land on March 23, 1961, beside Gila, would Badleys have received a penny from the award? The claimant (Badleys) take only through the landowner and the award goes to the landowner subject to the various claims.

The court appears to have followed this rule for the record shows the payments to Bane, Connecticut Mutual and Gillespie — who must have had some claim to Gila's land — yet the court was inconsistent in ordering Badleys to remit when the other three claimants were not so ordered.

If the court then orders a remittitur after the award has been paid out, a claimant to the fund who took through the landowner should not have to remit unless the remittitur reduces the award to a total value which is less than the claimant's share. In other words, the claimant having taken through the actual awardee he should not in this case have to remit. It should be the sole duty of the actual landowner Gila to make the full amount of the remittance.

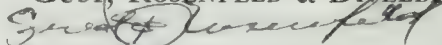
The court has ordered the Badleys remittitur to be joint and several with Gila. If the court is in agreement with the position of this appeal, the result will not be to deprive the government of any portion of its remittitur, for Gila will still be liable for the full sum of the remittitur. The final judgment reads:

"The *joint* and *several* liability of defendants Badley is limited to \$7,043.75 or 4.6% of the amount to be refunded." (Transcript of Record Document 23, page 80)

Thus, even if the Badleys prevail, the government's right to remittitur is not impaired for all rights to collect the full sum from Gila will still be in effect.

Respectfully submitted,

GUST, ROSENFELD & DIVELBESS



By FRED H. ROSENFELD

*Attorney for RUSSELL BADLEY and
CELESTE BADLEY, Appellants*

Twenty copies of the foregoing mailed to the United States District Court this 6th day of May, 1966.

Three copies of the foregoing mailed this 6th day of May, 1966, to:

Edwin L. Weisl, Jr.
Assistant Attorney General
Washington, D. C.

Roger P. Marquis, Attorney
Department of Justice
Washington, D. C. 20530

Edmund B. Clark, Attorney
Department of Justice
Washington, D. C. 20530

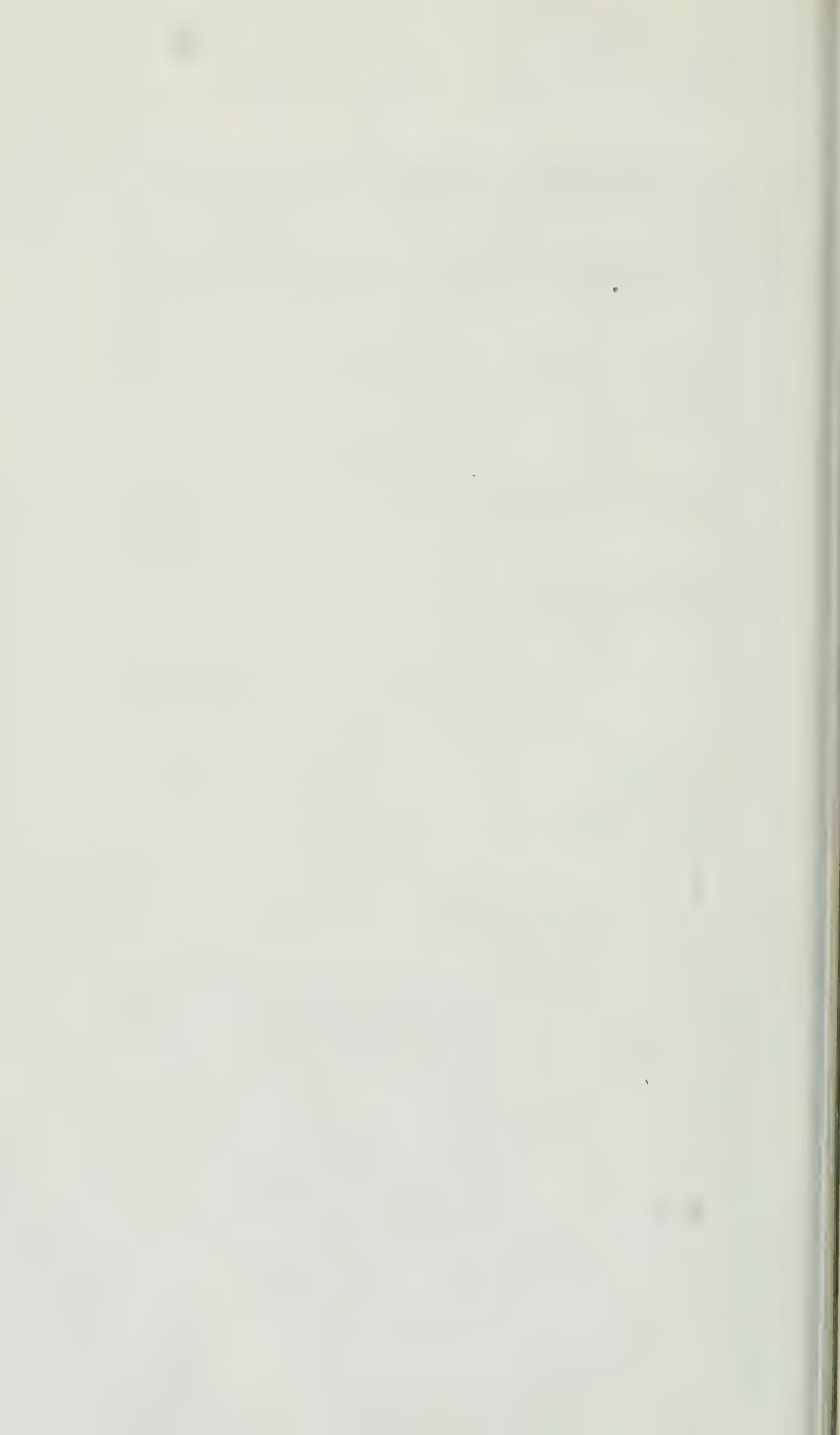
Two copies of the foregoing mailed this 6th day of May, 1966, to:

Mark Wilmer
Snell & Wilmer
400 Security Bldg.
Phoenix, Arizona

FRED H. ROSENFELD

I hereby certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals of the 9th Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

FRED H. ROSENFELD



Nos. 20643 and 20644 FEB 14 1967

IN THE
United States Court of Appeals
For the Ninth Circuit
1965 TERM

GILA RIVER RANCH, INC., a corporation and
RUSSELL BADLEY, and CELESTE BADLEY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20643

*Appeal from the
United States
District Court for
the District of
Arizona*

GILA RIVER RANCH, INC., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20644

**BRIEF OF APPELLANT
GILA RIVER RANCH, INC.**

FILED

MAY 9 1966

SNELL & WILMER

Attorneys for Appellant
Gila River Ranch, Inc.

WM. B. LUCK, CLERK

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Appellee.

BRIEF OF APPELLANT
GILA RIVER RANCH, INC.

This appeal involves two condemnation cases brought by the United States to condemn flood easements in a total of 18,945.29 acres of land lying under the "Painted Rock" Flood Control Dam as constructed and maintained by the United States on the Gila River north and west of Gila Bend, Arizona.

Case #3586 involved 18,866.50 acres of land and Case #4571, 78.79 acres. Only defendant Gila River Ranch was

involved as an owner in Case #4571. In Case #3586 appellants Russell Badley and Celeste Badley, his wife, were also involved as owners of approximately 640 acres of land. All acreage was contiguous and part of one large parcel of land. The trial judge ordered that the cases be consolidated for trial but separate verdicts were rendered as to each case and separate judgments entered as to each case.

JURISDICTIONAL STATEMENT.

In each case, the complaint which was filed by the United States Attorney alleged:

"The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Acts of Congress approved April 24, 1888 (25 Stat. 94, 33 U.S.C. 591) and March 1, 1917 (39 Stat. 948, 33 U.S.C. 701) which authorize the acquisition of land for flood control projects; the Act of Congress approved May 17, 1950 (Public Law 516 — 81st Congress), which act authorizes the construction of Painted Rock Dam and Reservoir in the Gila River Basin, Maricopa County, Arizona; and the Act of Congress approved September 2, 1960 (Public Law 86 — 700), which act appropriated funds for such purposes." (Cause #4571 contains the identical allegations with the above except that in the last three lines the words "September 2, 1960 (Public Law 86 — 700)" are changed to read "October 24, 1962 (Public Law 87 — 880)."

Gila River Ranch entered its appearance in each case and did not seriously challenge the jurisdiction of the District Court as alleged.

The defendants, Badley, filed their appearance during the trial of the causes and did not challenge the jurisdiction of the District Court.

The cases were tried to a jury, verdicts returned, judgments thereon entered, Motions for a New Trial were filed by the

United States and ruled upon by the District Judge. These motions were denied conditioned upon defendants' entering remittiturs in each case. Written remittiturs were executed, submitted to the trial judge for approval and approved and ordered filed by the trial judge.

Thereafter the United States proposed the entry of new judgments "on remittitur" in each case. Defendants objected thereto but the trial judge on November 16, 1965 overruled the objections, signed and entered new judgments and denied the Motions of the United States for a New Trial in each case.

Thereupon defendant Gila River Ranch on December 3, 1965 in each case filed its Notice of Appeal, Bond for Costs on Appeal and perfected this appeal.

Jurisdiction in this Court is conferred by 28 U.S.C.A. Sec. 1291.

STATEMENT OF QUESTIONS INVOLVED ON THESE APPEALS

In the main, one question is presented upon this appeal which requires for a satisfactory answer, answers to several sub-questions.

The main question presented is — "What is the jurisdiction and power of a federal district judge to revise a judgment entered upon a jury verdict after such judgment is signed by the District Judge and entered by the Clerk in the Civil Docket?"

The facts which give rise to this main question and the subsidiary questions hereafter stated, all of which arose after the judgment on the jury's verdict in each case was entered and the Motions for a New Trial were filed by the Government as to each case were as follows.

The Motions for a New Trial, filed by the United States, claimed various erroneous rulings by the trial judge and asserted

the claims that the verdict in each case was excessive. After briefs were filed and oral arguments heard by the trial judge the Court filed a "Memo Decision" (Tr. 14) in which the Court found the verdict in cause #3586 excessive by \$125,000.00 and in cause #4571 by \$800.00 and ordered

"If the defendant landowner, within 30 days from filing of this opinion, will file a stipulation to accept judgments on the verdicts in the two cases reduced by the above amounts, then the motion for new trial will be denied, otherwise the motion will be granted."

Within this thirty day period the landowner filed a remittitur in each case (Tr. 43) (Tr. 46) which

(a) Recited the pertinent portions of the judgment theretofore entered in that cause;

(b) Recited the pertinent parts of the order from the "Memo Decision" on the Motion for New Trial;

(c) Concluded with the statement:

"And said defendants and their attorneys further show that they desire to make remittitur (as to cause #3586) of \$125,000.00 of such judgment.

"Wherefore, they and each of them do hereby release unto the United States of America, plaintiff, the sum of \$125,000.00 of such judgment."

This was followed by the Court's approval:

"ORDER

"On this day in the above entitled cause came GILA RIVER RANCH, INC. and RUSSELL BADLEY and CELESTE BADLEY, defendants, by their attorneys of record, SNELL & WILMER, and having submitted to the Court for its approval remittitur of judgment and the Court having heard and con-

sidered the same and it appearing to the Court that said remittitur of judgment is in all respects fair, reasonable and just and should be made,

"Now upon motion of counsel it is:

"ORDERED, ADJUDGED and DECREED that said remittitur of judgment be and the same is hereby in all respects approved and confirmed by the Court and the Clerk is ordered to receive, accept and file the same herein.

"DATED at Aguna Guam, this 13th day of July, 1965.

(signed) Charles L. Powell
United States District Judge"

This order was signed by Judge Powell July 13, 1965 and returned to and entered filed by the Clerk.

Thereafter the United States filed a "Motion for Judgment" in each case to which was attached a proposed "Judgment on Remittitur."

This proposed new judgment reduced the judgment originally entered by \$153,125.00 rather than the \$125,000 agreed to by the landowners in cause #3586.

The reduction in cause #4571 above the \$800 was insubstantial for reasons not material to a decision in this case.

Defendant Gila River Ranch promptly objected to these Motions for Judgment and to the entry thereof and challenged the power and jurisdiction of the District Court to amend and vacate the judgments entered on the verdicts and enter new judgments (Tr. 55, 56, 57, 58, 59, 60).

Thereafter and on November 16, 1965 Judge Powell overruled the Objection to the Motions for Judgment of the United States and signed and forwarded for entry the new "Judgments

on Remittitur" and formally overruled the Motions for a New Trial of the United States (Tr. 75 through 84).

These appeals were thereupon taken.

SUBSIDIARY QUESTION 1.

"Considered in the light of the constitutional guaranty of a jury trial as contained in the Seventh Amendment to the Constitution of the United States, does a judge of a United States District Court in a civil cause tried to a jury have the power to reject a clearly expressed limitation contained in a remittitur filed pursuant to an order of such court on a Motion for a New Trial conditioning denial of such Motion upon the filing of a remittitur and enter a judgment for an amount less than the jury's award and also less than the reduction in the award and the judgment entered thereon agreed to by the remitting party?"

SUBSIDIARY QUESTION 2.

"After a judgment upon a jury's verdict in a civil case tried in a United States District Court has been signed by the District Judge and filed and entered by the Clerk of the Court does such District Judge have the jurisdiction to thereafter, over the objection of a party to such judgment, vacate and open the original judgment and sign a new and different judgment and cause such new judgment to be entered by the Clerk?"

Appellant asserted that the answer to each of the above two questions must be in the negative by challenging the jurisdiction and power of the District Judge in the Court below to enter new judgments under the circumstances of this case as hereinabove indicated.

SPECIFICATION OF ERRORS RELIED UPON

I. The District Judge erred in opening and vacating the judgments entered upon the jury's verdicts and in signing and causing

new and different judgments to be entered over this appellant's objections for the reason that a United States District Court Judge has no power or jurisdiction to open and vacate a judgment entered upon a jury's verdict for the purpose of signing and causing the entry by the Clerk of a materially different judgment from the jury's verdict and the judgment entered thereon, absent all parties' express agreement thereto.

II. The District Judge erred in opening and vacating the judgments originally entered upon the jury's verdicts and in signing a new judgment and causing the same to be entered by the Clerk of the Court which new judgment effects a reduction and change in the original judgments entered upon the jury's verdict greater than and different from the reduction and change agreed to in a remittitur filed by the party thereto adversely affected thereby for the reason such judicial action denies the party affected thereby a trial by jury in contravention of the Seventh Amendment to the United States Constitution.

III. The District Judge erred in vacating and opening the judgments entered on the jury's verdicts and entering new and different judgments for the reason Rule 58(a), Federal Rules of Civil Procedure, only allows such action by the trial court in a case tried to the Court without a jury, and thereby impliedly denies such authority to the Court in a case tried to a jury.

CONCISE STATEMENT OF THE CASE

Since this appeal presents two narrow questions and the facts giving rise to this appeal have already been adequately stated, appellant will not here restate the facts or offer a further summary.

THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION QUESTION

Perhaps a better way to express the question posed by this phase of this appeal is to state yet another question. It is:

"Does a United States District Judge have the power to decrease the amount of a judgment entered upon a jury's verdict beyond and in excess of the amount of decrease expressly agreed to by the party in whose favor the judgment runs through the device of entering a new judgment 'on remittitur' which judgment, over the objection of the remitting party, increases the amount remitted over that agreed to in the remittitur?"

To state the question is to state the answer.

The interest allowed in a judgment entered on a jury's verdict in a case where immediate possession has been taken by the United States is as much a part of the "just compensation" awarded by the judgment as the dollar amount fixed by the jury.

In *Bishop v. United States*, 288 F.2d 525 (1961) the Fifth Circuit stated the rule clearly:

"While, in this problem, we deal with a statute, the statute is one which has constitutional overtones, and it is to be read in this light. The Declaration of Taking Act 'does not bestow independent authority to condemn lands for public lands. On the contrary, it provides a proceeding "ancillary or incidental to suits brought under other statutes," *Catlin v. United States*, * * (324 U.S. [229] at 240 [65 S.Ct. 631, at page 637, 89 L.Ed 911]).' *United States v. Dow*, 1958, 357 U.S. 17, at page 23, 78 S.Ct. 1039, at page 1045, 2 L.Ed.2d 1109; *In re United States*, 5 Cir., 1958, 257 F.2d 844, 847. By the time of its enactment in 1931, the doctrine was unquestioned that interest was a part of just compensation not, as in a damage suit, a mere payment for delay. 'Where the United States condemns and takes possession of land before * * * paying compensation, the owner is not limited to the value of the property at the time of taking; he is entitled to such addition as will produce the full equivalent of that value, paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added.' This is so because the compensation must be 'the full and perfect equivalent of the property taken.' *Seaboard Airline Railway Co. v. United States*,

1923, 261 U.S. 299, 304, 306, 43 S.Ct. 354, 356, 67 L.Ed. 664. Citing this case specifically, the Court reiterated this in the broadcast of terms. 'The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.' *United States v. Miller*, 1943, 317 U.S. 369, 373 and note 9, 63 S.Ct. 276, 279, 87 L.Ed. 336.

"This Act is a mechanism by which to facilitate the exercise of the sovereign's power of eminent domain and give full practical protection to both Government and owner alike. It could not have been intended to whittle down the property owner's rights for 'interest from the date of taking is usually a part of just compensation to be paid and cannot be denied by statute.' *Atlantic Coast Line R. Co. v. United States*, 5 Cir., 1943, 132 F.2d 959, 962. 'The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. Secondly, to give the former owner, if his title is clear, *immediate cash compensation to the extent of the Government's estimate of the value of the property.* * * ' *United States v. Miller*, supra, 317 U.S. at page 381, 63 S.Ct. at page 283. *The objective of the latter is to give 'the owner the immediate use of cash approximating the value of his land.'* 317 U.S. 381, 63 S.Ct. 284

"Congress did not, by word 'deposit' in § 258a, note 1, supra, mean that the Constitutional mandate of just compensation would be satisfied by the mere act of delivering cash to some depository. It contemplates a transfer of funds for the effectual withdrawal and use by the former owner of the property taken. Unless that were so, it could not constitute a 'payment * * of estimated compensation * * *' or 'a payment "on account of" compensation,' 317 U.S. at page 381, 63 S.Ct. at page 284." (Emphasis supplied)

When the judgments were entered upon the jury's verdicts the "just compensation" to which the landowners were entitled became settled and liquidated. It consisted of

(a) The value of the easement taken by the judgment;

(b) The value of possession and use of the property taken between the date of taking and the date of the judgments vesting title in the United States. Use of the money deposited by the United States as "estimated compensation" during this period of possession without title constitutes just compensation for this use.

The judgments entered merged all components making up the judgment and the judgment then became the measure of the landowners' rights. *Restatement of the Law*, "Judgments," Sec. 47.

The order of the Court upon the Motions for a New Trial of the United States was ambiguous, at best. While the Court speaks of reducing the "verdicts" in each case by specified amounts in the order, the Court requires that landowner "file a stipulation to accept judgments on the verdicts *reduced by the above amounts*" if a new trial is to be denied. (Tr. 40, 41, 42).

As above indicated the remittiturs filed in each case recite and expressly refer to:

(a) The judgments entered upon the jury's verdict;

(b) The order of the Court requiring that a remittitur be filed or a new trial ordered including the exact terminology thereof.

Defendants then, expressly agree and stipulate:

"* * * they, and each of them, *do hereby release unto the United States of America*, plaintiff, the sum of \$125,000 (\$800 as to cause #4571) *of such judgment*." (Emphasis supplied)

These remittiturs, plainly calling attention to the judgments entered on the jury's verdicts and the language of Judge Powell's Order and plainly spelling out how defendants understood the Court's Order and *what they agreed to*, were submitted to Judge Powell and he, by written Order, found:

"* * * said remittitur of judgment is *in all respects* fair, reasonable and just * * *"

and the Court further in each case

"ORDERED, ADJUDGED AND DECREED that said remittitur of judgment be and the same is hereby in all respects approved and confirmed by the Court and the Clerk is ordered to receive, accept and file the same herein." (Tr. 45, 48)

Thereafter the United States filed "Motions for Judgment" to which were attached proposed forms of "Judgment on Remittitur" and the Court after considering the written objections of the defendants granted these and signed and caused to be entered the "Judgments on Remittitur" enlarging the consent and remission of just compensation complained of on these appeals.

Defendants read *O'Brien v. Hobart*, C.A. 1, 1957, 249 F.2d 654, as supporting the remittiturs filed. The United States says we misread *O'Brien*. Reappraisal of *O'Brien* in the light of the Government's contention raises a question in defendant's mind if *O'Brien* was correctly read by us.

This is wholly beside the point. What caused defendants to agree to this reduction in the judgments as stated in the remittiturs is wholly immaterial. The fact is that *all defendants agreed to* was a reduction in the judgment in cause #3586 of \$125,000 and in cause #4571 of \$800. This cannot be gainsaid if the English language be given its normal and accepted meaning.

Certainly when it is recognized that in cause #4571 the United States had deposited as "estimated just compensation at the outset of the litigation when possession was taken the sum of \$7850.00 and the jury had awarded only the sum of \$6400.00, defendants cannot be blamed if they read the Court's Order as requiring no more than a forgiveness of only \$800. This would make a total final award below the Government's original estimate of just compensation in 1963 of \$2250.00.

Likewise the Government, in cause #3586, had, after verdict and judgment but before Judge Powell's ruling on the Motions for a New Trial, estimated the "just compensation" due defendant at the full amount of the judgment and paid this sum into Court.

Judge Powell was apparently more "sold" on the fact the verdicts were excessive than was the United States; and certainly the defendants, under these circumstances, cannot be blamed if they received Judge Powell's decision finding the verdicts excessive with a degree of incredulity.

Be that as it may, the jurisdiction of a District Judge to order a remittitur and effect a reduction in a judgment entered on a jury's verdict rests upon the consent of the parties to the litigation; otherwise the Court's action contravenes the Seventh Amendment to the Federal Constitution.

Moore's Federal Practice, 2d Ed. Vol. 6, Par. 59.05(3)

Becker Bros. v. U.S., 7 F.2d 3 (C.A.2)

The Arkansas Valley Land and Cattle Co. v. Mann, 130 U.S. 69, 9 S.Ct. 458, 32 L.Ed. 854

Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603

De Pinto v. Provident Security Life Insurance Co., C.A. 9, 323 F.2d 826.

THE RULE 58, FEDERAL RULES OF CIVIL PROCEDURE QUESTION

Rule 58, Federal Rules of Civil Procedure, provides, in part:

"On a motion for a new trial *in an action tried without a jury* the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

That a United States District Court and the judges thereof have a limited, statutory jurisdiction is too well settled to require citation of authority.

Leary v. U.S., 268 F.2d 623, C.A.9

Modern Federal Practice Digest, Key 255, "Courts"

The only basis for the action of the District Judge in signing and causing the entry of new judgments in each of these causes was the "Motion for Judgment" (Tr. 51, 52, 53, 54) of the United States. No rule is cited or other procedural precedent referred to as justifying this novel procedure. The remittiturs filed by defendants released from the existing judgment — remitted from the filed judgments expressly identified therein — specified amounts. Nowhere did defendants consent expressly or impliedly to any change in the judgments entered upon the jury's verdicts *other than by satisfying each such judgment to the extent specified in each remittitur.*

The error of the District Judge is patent.

CONCLUSION

Appellant respectfully requests that the "Judgments on Remittitur" in each cause be vacated and held void for the reasons above stated.

Respectfully submitted,

SNELL & WILMER

By Mark Wilmer

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney

~~FEB 1 1967~~

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GILA RIVER RANCH, INC., a corporation,
and RUSSELL BADLEY and CELESTE BADLEY,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

GILA RIVER RANCH, INC., a corporation,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEE

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JUL 15 1966

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 20643 and 20644

GILA RIVER RANCH, INC., a corporation,
and RUSSELL BADLEY and CELESTE BADLEY,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

GILA RIVER RANCH, INC., a corporation,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEE

OPINION BELOW

The district court did not write a formal opinion on the subject matter of these appeals. The order entering the final judgments, however, does contain the court's reasons for its decision (R. 76).

JURISDICTION

The jurisdiction of the district court over these condemnation actions was invoked under 28 U.S.C. sec. 1358.

Judgments were entered on November 16, 1965 (R. 78-84). Timely notices of appeals were filed (R. 85, 86). Jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether parties who consent to a remittitur of a condemnation verdict rather than a new trial are entitled to interest on the amount remitted.

STATEMENT

The relevant facts on these appeals are not in dispute and may be summarized as follows:

The United States condemned flowage easements over the tracts involved (78.79 acres and 18,866.5 acres). On November 27, 1964, a jury returned verdicts of \$6,400 for the small tract and \$1,132,000 for the larger one as just compensation (R. 29, 30). On February 11, 1965, judgments were entered in the foregoing amounts "together with interest as provided by law" (R. 33, 35). By February 25, 1965, the United States had deposited in court and defendants had withdrawn \$1,250,887.00 with respect to the large tract and \$6,400 for the small one.

Upon timely motion by the United States for new trial on the grounds that the award was excessive (R. 36-39), the district court ruled that (R. 42):

The verdict should be reduced in Cause No. 3586 in the amount of \$125,000.00, and in Cause No. 4571 in the amount of \$800.00. If the defendant landowner, within 30 days from filing of this opinion, will file a stipulation to accept judgments on the verdicts in the two cases reduced by the above amounts, then the motion for new trial will be denied, otherwise the motion will be granted.

Both Gila River Ranch and the Badleys (the parties interested in the larger tract) agreed to the \$125,000 remittitur (R. 43-44) and Gila River Ranch agreed to the \$800 remittitur (R. 46-47). The court on July 13, 1965, approved the remittiturs (R. 45, 48). The United States moved to vacate the January 29 judgments and enter judgments on the verdicts as remitted (R. 51-54). Defendants objected on the grounds that interest should be calculated on the amounts of the rejected verdicts and the remittiturs subtracted from those totals (R. 55-60). The Badleys objected to being charged with any of the remittitur because they had contracted with Gila River as to their share on distribution (R. 67-70). The district court granted the Government's motions (R. 75-77) stating (R. 76):

It is my determination now, and was my intention at the time the memo decision was filed, that the remittitur in each case was a reduction in the amount of the verdict. It was so worded as it said the stipulation was to accept "* * * judgments on the verdicts in the two cases reduced by the above amounts. * * *" The verdicts were to be reduced and the judgments entered on the verdicts as so reduced. I am granting plaintiff's motions for entry of judgments. They are in effect amended judgments. I consider this ruling in accord with O'Brien v. Hobart, 249 F.2d 654 (1 Cir. 1957).

Judgments were accordingly entered on November 18, 1965, for \$1,007,000 with interest as to the large tract and \$5,600 as to the smaller (R. 78-84). Interest on the large sum was \$90,762.75 for a total award of just compensation of \$1,097,762.50 (R. 79). Defendants, however, as noted earlier had withdrawn \$1,250,887.75 and \$6,400 so refunds to the Government were ordered in the amounts of \$153,125 and \$800 (R. 80, 83). These appeals followed (R. 85, 86).

ARGUMENT

THE AGREED REMITTITURS WERE PROPERLY
SUBTRACTED FROM THE REJECTED VERDICTS
BEFORE INTEREST WAS COMPUTED

Appellants do not seriously question the court's authority to order the remittitur upon consent of the parties

remitting. The law on that score is too well settled to merit discussion. Dimick v. Schiedt, 293 U.S. 474, 482-485 (1935). The validity of ordering a remittitur by consent in lieu of a new trial in a condemnation case is also established. United States v. Certain Parcels of Land in Rapides Parish, La., 149 F.2d 81, 83 (C.A. 5, 1945); United States v. Kennesaw Mountain Battlefield Ass'n., 99 F.2d 830 (C.A. 5, 1938).

Appellant, Gila River Ranch, infers that the district court was without jurisdiction to vacate the first judgment and enter a new judgment based upon the remittitur (Br. 6, 12-13). There is no merit to this contention. As the Court of Appeals for the Seventh Circuit held in analogous circumstances, United States v. 93,970 Acres of Land, Etc., 258 F.2d 17, 21 (1958), reversed on other grounds, 360 U.S. 328 (1959):

It is hardly open to doubt but that the first judgment standing alone was final and, therefore, appealable. It is equally certain that the Court, either on its own volition or at the instigation of the parties, possessed the authority within an appropriate time to vacate, modify or amend that judgment. We also think that in determining the question of the finality of the first judgment it should not be confined in a vacuum, separate and apart from the proceedings which followed.

The practice of vacating and entering a new judgment after remittitur was also recognized in O'Brien v. Hobart, 249 F.2d 654 (C.A. 1, 1957). Indeed a contrary view carried to its logical extreme would indicate that the first judgment could not be vacated and a new judgment entered even after a new trial. A consent remittitur as an alternative to granting a timely filed motion for a new trial has the same effect upon jurisdiction over the first judgment as an award after a new trial. In short, the remitted verdict substitutes for the award after a new trial had appellants refused to remit.

As to appellant Gila River Ranch's argument that the remittitur to which it consented should be subtracted from the rejected verdict plus interest calculated thereon, it is perhaps enough to state that O'Brien v. Hobart, 249 F.2d 654 (C.A. 1, 1957) in similar circumstances held at 654:

In the absence of language by the trial judge in his original memorandum expressly stating that the remittitur was to be subtracted from the verdict plus interest, this court considers that the remittitur was to be subtracted from the verdict only. Here interest was not an element of damages considered by the jury. It is an item which

was added to the verdict by the clerk. It was the verdict of the jury for \$61,000 that the trial judge considered excessive. It was his judgment that a verdict for more than \$48,000 should not have been rendered.

In the instant case the trial judge specified in his memorandum directing remittitur or new trial that remittitur was to be made from the verdict (Statement, supra, p. 3), and reiterated that in his subsequent order to enter a new judgment (Statement, supra, p. 4). Gila River Ranch's insistence that it consented only to remit \$125,000 and \$800 from the rejected verdicts, plus interest, is at best a claim that it did not comply with the court's clearly stated condition. Appellant's extended quotation from Bishop v. United States, 288 F.2d 525 (C.A. 5, 1961) (Br. 8-9) demonstrates the applicability of O'Brien v. Hobart to this condemnation case. Nothing could be more clear than that interest is a part of compensation only insofar as it is computed upon a verdict ascertaining market value at the time of taking. Here it is the verdict as reduced by the remittitur that represents fair market value and it is upon that amount that interest was properly computed.

It would be inappropriate for a jury in a condemnation case to return a verdict inclusive of interest. Indeed, in the usual case, it would be inappropriate for the district court to enter judgment with interest added at this stage. This is because interest runs from the date of taking to the date of complete payment of compensation, adjustments being made for any deposits prior thereto. Consequently, the court's judgment so provides rather than calculating the interest to that date.^{1/}

CONCLUSION

For the foregoing reasons, we submit that the judgments should be affirmed as to subtracting the amounts agreed to be remitted from the verdicts prior to the computation of interest. We note also that appellants, Badleys, do not contest this. Since the other points raised by appellants in their briefs relate only to a dispute between them as to apportionment

^{1/} We deem inapplicable Rule 58, F.R.Civ.P. providing for automatic entry of judgment by the clerk of the district court.

f the award, we deem it inappropriate to comment on the merits
f their respective claims. See Duckett & Co. v. United States,
66 U.S. 149 (1924); United States v. Dunnington, 146 U.S. 353
1892).

Respectfully submitted,

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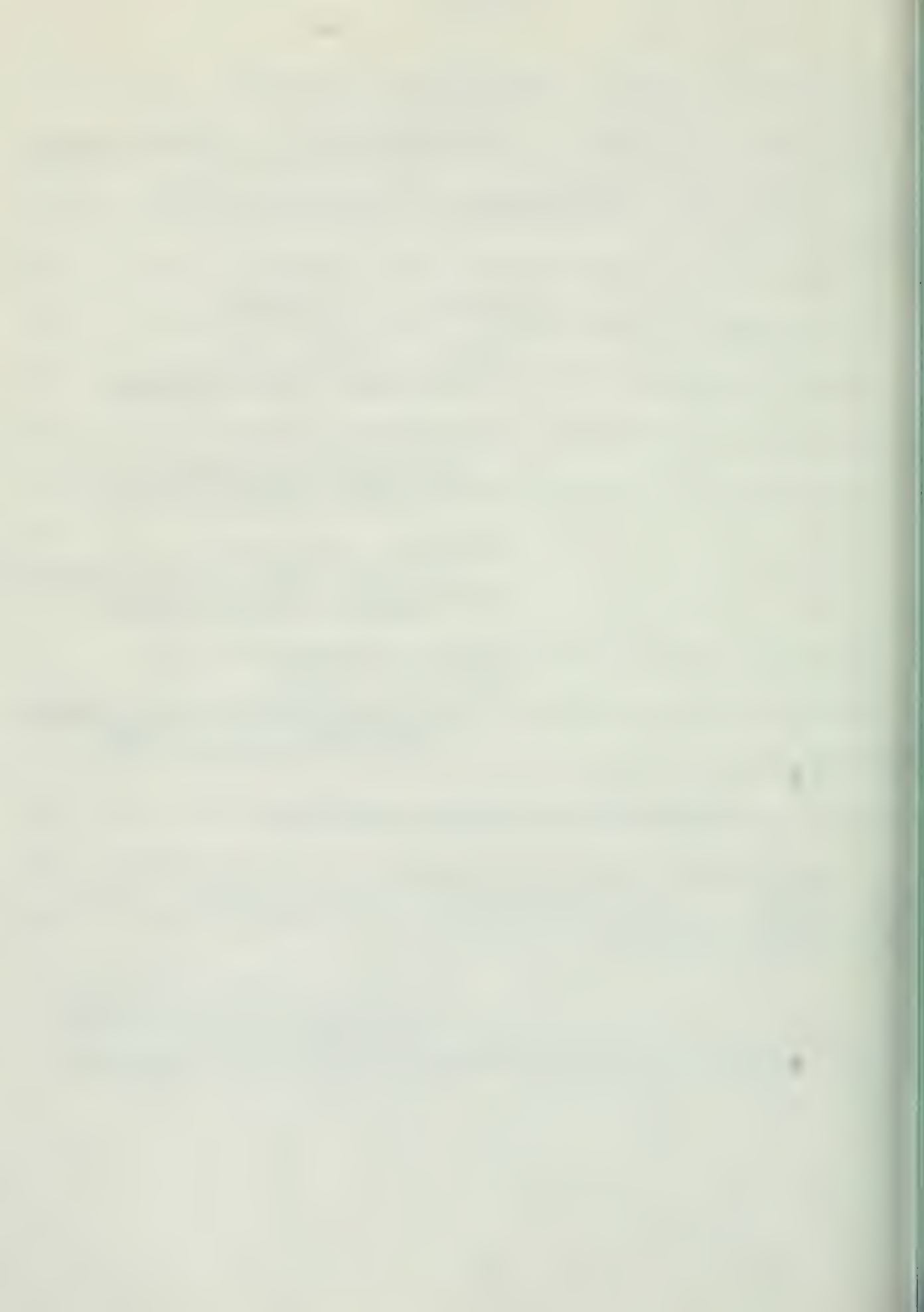
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Attorneys, Department of Justice,
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JULY 1966

CERTIFICATE OF EXAMINATION OF RULES

I certify that I have examined the provisions of
Rules 18 and 19, of the United States Court of Appeals for the
Ninth Circuit, and that, in my opinion, the tendered brief con-
forms to all requirements.

Edmund B. Clark
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Attorney, Department of Justice
Washington, D. C., 20530



FEB 14 1967

No. 20643

In the

United States Court of Appeals
for the Ninth Circuit

GILA RIVER RANCH, INC., a corporation, and
RUSSELL BADLEY and CELESTE BADLEY,
Appellants,

vs.

UNITED STATES of AMERICA,

Appellee.

On Appeal from the United States District Court

Reply Brief Of
Russell and Celeste Badley

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20643

In the

United States Court of Appeals

for the Ninth Circuit

GILA RIVER RANCH, INC., a corporation, and
RUSSELL BADLEY and CELESTE BADLEY,
Appellants,

vs.

UNITED STATES of AMERICA,

Appellee.

On Appeal from the United States District Court

Reply Brief Of Russell and Celeste Badley

ARGUMENT

These appellants' Opening Brief sought either to have the remittitur reduced or removed as it affects Russell and Celeste Badley. The answering brief of the appellee, United States Government, fails to comment on the claim of this appellant and we assume the United States Government does not contest the Badley's position.

Our Opening Brief was not answered by Gila River Ranch, Inc., therefore we assume Gila does not contest our position.

We reiterate from our Opening Brief that the Government's

rights will not be impaired for the remittitur may still be collected from Gila. The final judgment reads as follows:

“It is ordered defendants Gila River Ranch, Inc. and Russell Badley and Celeste Badley, his wife, refund to the registry of this court \$153,125 The joint and several liability of the defendants Badley is limited to \$7,043.75 or 4.6% of the amount to be refunded.”

Gila does not assign as error the joint liability of the parties as set forth in the final judgment and at this point could not raise this issue. In fact Gila and the Badleys have settled their claims in a separate agreement. The only question raised in Gila's Opening Brief goes into the amount of the remittitur, i.e. whether or not interest is also to be added to the amount to be remitted. However, the judgment is joint and several and being set forth as such obligates Gila to pay the full sum of the remittitur whatever that full sum may eventually be. If the appellee does not wish to contest the Badley's position and if Gila cannot now contest our position having neither answered our brief or raised a question to the joint liability of the two appellants in its opening brief the issue should now be closed. Thus the Badleys stand on the arguments in their Opening Brief.

CONCLUSION

Therefore, for the reasons stated in our Opening Brief appellants Russell and Celeste Badley ask the court to modify the final judgment on the remittitur either reducing the Badley share of the remittitur or completely relieving the Badleys of any obligation to remit any sum whatsoever.

Respectfully submitted,

GUST, ROSENFELD & DIVELBESS

By FRED H. ROSENFELD

*Attorney for RUSSELL BADLEY and
CELESTE BADLEY, Appellants.*

Twenty copies of the foregoing mailed to the United States

District Court this 29th day of July, 1966.

Three copies of the foregoing mailed this 29th day of

July, 1966, to:

Edwin L. Weisl, Jr.
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Washington, D. C. 20530

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Two copies of the foregoing mailed this 29th day of

July, 1966 to:

Mark Wilmer
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Phoenix, Arizona

FRED H. ROSENFELD

FRED H. ROSENFELD

I hereby certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals of the 9th Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

FRED H. ROSENFELD

FRED H. ROSENFELD

IN THE

United States Court of Appeals

FEB 14 1967

For the Ninth Circuit

1965 TERM

GILA RIVER RANCH, INC., a corporation and
RUSSELL BADLEY, and CELESTE BADLEY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20643

*Appeal from the
United States
District Court for
the District of
Arizona*

GILA RIVER RANCH, INC., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20644

**REPLY BRIEF OF APPELLANT
GILA RIVER RANCH, INC.**

SNELL & WILMER

Attorneys for Appellant
Gila River Ranch, Inc.

FILED

JUL 29 1966

WM. B. LUCK, CLERK

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IN THE

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1965 TERM

GILA RIVER RANCH, INC., a corporation and
RUSSELL BADLEY, and CELESTE BADLEY,

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No. 20643

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United States
District Court for
the District of
Arizona*

GILA RIVER RANCH, INC., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20644

REPLY BRIEF OF APPELLANT
GILA RIVER RANCH, INC.

Counsel for the appellee must have examined a different record from that which was before appellant, Gila River Ranch, Inc., (hereinafter "Gila") when appellee prepared its Opening Brief and, indeed, must have misread Gila's Brief, since the Brief for Appellee raises and discusses legal questions which, to the knowledge of Gila, had not been posed by its appeal. Perhaps it was easier for the United States to present questions which it

could answer and having nicely glued together a suitable legal straw man, then proceed to demolish the sickly fellow.

There are two questions to be answered on this appeal. The Government has restated one and, in restating it, has by this device likewise wholly avoided it; it has not even bothered to restate the other.

Question one is, as stated in Gila's Brief:

After judgment has been entered upon a jury verdict in a United States District Court and the District Judge has ordered either that the prevailing party file a remittitur or that a new trial be granted and a remittitur is filed and approved by the District Judge, does the District Judge thereafter, upon application of the other party to the action, have power to enlarge the consent of the remitting party, over the objection of such party?

Stated otherwise, does the mere filing of remittitur consenting to a reduction in the amount of a judgment permit a District Judge to disregard the plain language of the party's consent stating the amount of reduction agreed to and amend the judgment as filed by increasing the amount of the reduction agreed to through the device of entering a new "Judgment on Remittitur?"

The United States has refused to come to grips with this question.

Whether interest on the amount remitted, as the measure of just compensation for the use and occupation of the property subsequent to taking and prior to judgment, is or is not allowable is a question wholly irrelevant to this appeal.

The Government cites *United States v. 93,970 Acres of Land*, etc., 258 F.2d 17, 21, CA 7 (1958) which is not in point. There a defendant landowner moved for additur or for a new trial and *upon the urging* of the landowner an additur was ordered in the amount of \$50,000.00 plus interest and an amended or new judgment entered reflecting this change. The authority and jurisdiction of the District Court to do this was not in issue or discussed. The Court held that an additur could not be made by the Court, *absent*

the consent of the party unfavorably affected thereby or otherwise the right to a jury trial would be violated.

The Government then argues that "at best" Gila's position is that it did not comply with the "court's clearly stated condition." If so, the remedy was that of granting the Motion for a New Trial filed by the United States—not to enlarge the consent to fit the Court's ambiguously stated condition.

The Government quotes from the Court's order granting plaintiff's Motions for Entry of Judgments, (p. 4):

"It was so worded as it said the stipulation was to accept * * judgments on the verdicts in the two cases *reduced by the above amounts.*" (Emphasis ours)

Does not this fairly mean the judgments are to be accepted reduced in that amount? At least appellant so read it and the remittitur tendered for approval by the Court is crystal clear that it is from the amount of the judgment that the remittitur is made—not the verdicts. Certainly when we speak of a judgment reduced by the "above amount(s)" we think of a judgment reduced by \$125,000.00, the "above amount."

The Government has wholly failed to even discuss the constitutional impediment to enforcing a remittitur in an amount greater than that agreed to by the party affected. We can only assume it has nothing helpful to its position to offer.

The other question clearly presented by Gila's appeal is whether or not, after a formal, written judgment has been entered upon a jury's verdict a District Judge can, without the consent of the parties or other justification spelled out in the Rules, open up or vacate such judgment and enter a new and different judgment.

To this question the Government offers no answer, helpful or otherwise.

The appellee does not even discuss the plain implication in Rule 58, Federal Rules of Civil Procedure, that once a judgment is entered *upon a jury's verdict* the Court has no jurisdiction to open, enlarge or otherwise *materially* change its terms. The sole

power of the District Court, other than by consent of the parties, is to vacate the judgment in a proper case by granting a new trial.

We assume the United States ignores this legal problem for the same reason it does not attempt to deal with the question of the validity of the Court's action in enlarging the consent to the remittitur as filed by appellant.

If the District Court cannot constitutionally order a additur to a condemnation judgment without the consent of the party adversely affected, it should follow by like reasoning that a District Judge may not, not only order an "additur" to the amount agreed to be remitted by the condemnee, but also "shove it down the throat" of the party adversely affected "whether he will or no" by entering judgment against the condemnee over his protests for the amount added to the remittitur by the District Judge.

Dimich v. Schiedt, 293 U.S. 474 (1935)

United States v. 93,970 Acres of Land, 258 F.2d 17, CA 7 (1958)

De Pinto v. Provident Security Life Insurance Co., 323 F.2d 826, CA 9 (1963)

THE BRIEF OF APPELLANTS RUSSELL AND CELESTE BADLEY

The Opening Brief of Appellants Badley is devoted to their claim that the Amended Judgment either apportioned too much of the refund to them or they should not be required to refund any amount. Their Reply Brief has not been received and hence our comments must be directed to the position taken by the Badleys in their Opening Brief.

Gila regarded the Amended Judgment as a nullity in excess of the District Judge's jurisdiction both as in contravention of Rule 58 of the Federal Rules of Civil Procedure and as violating the constitutional right of Gila to a jury trial and hence did not deal with this phase of the District Judge's action in our Opening Brief.

Appellant, Gila, is unclear as to just what posture this phase

of the appeal assumes. The action of Judge Powell of which appellants Badley complain was not taken in an adversary proceeding. The original judgment (T.R. 31, 32, 33) condemned the land involved and fixed the just compensation, but not in favor of or as payable to any party. The Motion for a New Trial did not seek a new trial as against either landowner Gila or Badley but simply a new trial. (T.R. 36, 37, 38).

The Motion for Judgment of the United States and the proposed "Judgment on Remittitur" dealt with Gila and Badley without recognizing any difference between them as defendants except for the limitation upon Badley's liability for the refund. This was the judgment entered by the Court so the Court's intent as to who should be liable for the refund is quite clear even if the language of its Order granting the Government's Motion for Judgment may have been less than explicit.

Gila filed an Objection to "Motions for Judgement" and "Judgement on Remittitur" of the United States which generally raised the same legal objections which are found in Gila's Opening Brief.

Appellants, Badley, filed an "Objection to Form of Judgement" on the same day that Gila filed its Objections. Badley raised the same contention as to the effect which should be given to the "Court's Memo Decision" by reason of the fact the Court referred there to the "defendant landowner" in ordering a remittitur or a new trial as it now raises in this Court. Judge Powell in effect found this not to have been its effect when he signed the "Judgement on Remittitur" and hence the claim must be disregarded as specious. In fact the term "defendant landowner" applies equally to the Badleys.

The main complaint of Badleys was that the proposed judgement exposed them to the entire refund of \$153,125.00. Gila, in its Objections had likewise called the Court's attention to this possibility and said it was unfair. (T.R. 57).

The Court limited the Badley's exposure for refund but otherwise rejected the balance of their Objections.

Badleys, in their Opening Brief, raise claims which were never litigated and upon which evidence, directed to such claims, has never been taken. In fact a whole lawsuit is tried by the Court, *sua sponte*, without any of the parties having notice that their adversary claims were up for judicial action.

The action of Judge Powell taken without pleadings tendering the issue or evidence informing the Court as to factual matters not of record was unwarranted. Appellants make assertions which tell only a fragment of the story. They point to the fragments of the record as if the Court can view the few bones of the body exposed to view and make an accurate determination of the size, shape and appearance of the body.

The record shows that the original deposit of "estimated just compensation": was paid out, December 8, 1961, as follows: \$489,940.00 to defendants, F. A. Gillespie & Sons Company, \$100,000.00 to Connecticut Mutual Life Ins. Co. and \$1000.00 to O. L. Bane (T.R. 106), and that on December 6, 1963, the defendants Gillespie and Bane filed disclaimers and the action was dismissed as to them without costs. (T.R. 108).

Contrary to the implications of Badleys' Opening Brief, the money they received was an apportionment of "estimated just compensation" and not of the jury award or the judgement entered thereon.

The Civil Docket of the clerk, cause No. 3586, shows that on December 24, 1964, after the trial but prior to the *entry of the original judgment* the United States deposited additional compensation in the sum of \$475,400.00 a sum equal to the deficiency between the amounts originally deposited as "estimated just compensation" and the jury verdict *plus accrued interest* upon this deficiency *to date of deposit* making a total deposit of \$594,287.75 (T.R. 110). Of the original "estimated just compensation" deposited, the sum of \$65,660.00 had been retained by the clerk (T.R. 106, December 8, 1961 entry), which made a total sum of \$659,947.75 on deposit with the clerk as "estimated just compensation" on February 26, 1965. On this date, pursuant to court order the clerk paid out this entire sum,

\$52,000.00, directly to Russell Badley and Celeste Badley and the balance of \$607,947.75 to Gila. (T.R. 110, entry February 26, 1965). This additional deposit was made by the United States prior to the entry of the original judgment (T.R. 110) and was withdrawn, after entry of judgment on the verdict, (including in the withdrawal the balance remaining with the clerk of the first deposits) and after the United States had filed its Motion for a New Trial but while this Motion was still pending. (T.R. 110).

It was withdrawn, not as the award of the jury or of a judgment as paid but as a withdrawal of "estimated just compensation" without prejudice and since the fund was made up of accrued interest, in part, Badleys received a part of the interest as truly as Gila did. The order authorizing this withdrawal reads (T.R. 44):

"Ordered that the Clerk of this Court be and he is hereby directed to disburse the sum of \$52,000.00 of the funds allocated and deposited with the Declaration of Taking filed in the above cause to RUSSELL BADLEY and CELESTE BADLEY, and the sum of \$607,947.75 to GILA RIVER RANCH, INC., said disbursement being without prejudice as prayed for in the foregoing application."

Plainly the interest was part of the fund which was divided by agreement between Gila and Badley and plainly the accrued interest was considered in arriving at the sum Badleys should receive.

All of which does no more than point up the fact that the District Judge was a volunteer when he, *sua sponte*, elected to adjust the rights and obligations as between Badleys and Gila without a hearing being afforded either party.

Certainly there runs through Badleys' Brief the implication that maybe they were not fully represented in the trial of the case and in the following proceedings and hence Gila should be in some fashion penalized.

Certainly this should be explored on a hearing—not in ex parte statements. The facts as to whether or not Badleys freely

elected, after advice from their present counsel, to proceed as they did, should be explored—on a hearing. Who paid the heavy appraisal, deposition and legal costs should also be weighed—but in open court with free cross examination.

CONCLUSION

We respectfully submit that Judge Powell, in addition to assuming powers which have been denied United States District Judges in cases tried to juries, by increasing the amount of reduction appellants agreed to in their remittitur without their consent, also assumed the authority to adjudicate the rights and obligations as between Gila and Badleys, *sua sponte*, upon a wholly incomplete record as to all the facts which bear upon the question.

We respectfully represent that the learned Judge was in error in both respects.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Mark Wilmer

FEB 14 1967

IN THE

United States Court of Appeals

For the Ninth Circuit

GILA RIVER RANCH, INC., a corporation,
and RUSSELL BADLEY, and
CELESTE BADLEY,

Appellants,

No. 20643

vs.

UNITED STATES OF AMERICA,

Appellee.

*Appeal from the
United States*

*District Court for
the District of
Arizona*

GILA RIVER RANCH, INC., a corporation,

Appellant,

No. 20644

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING OF GILA RIVER RANCH, INC.

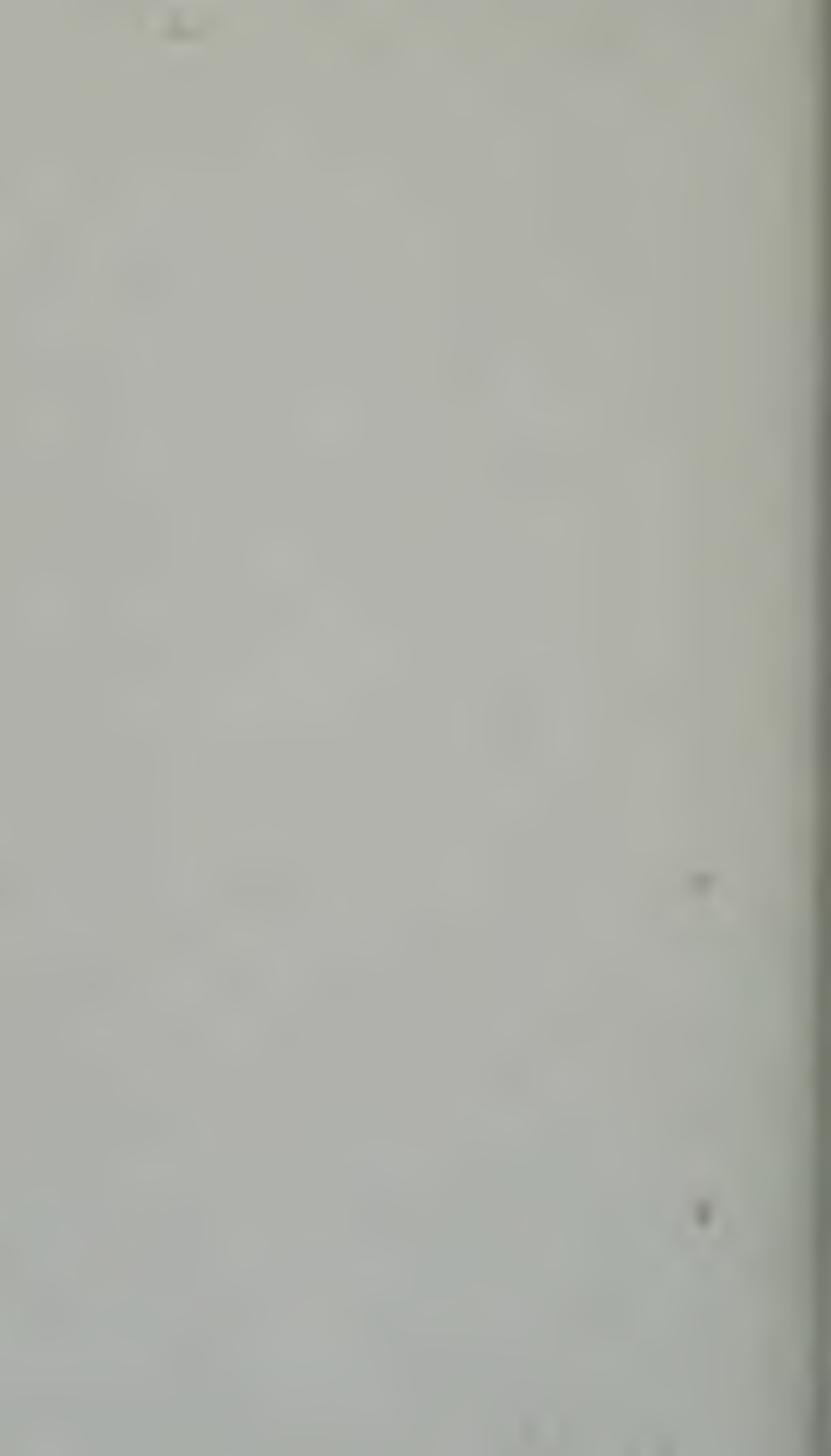
SNELL & WILMER

Attorneys for Appellant
Gila River Ranch, Inc.

FILED

FEB 12 1967

U.S. COURT OF APPEALS



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PETITION FOR REHEARING OF GILA RIVER RANCH, INC.

Appellant, Gila River Ranch, Inc., respectfully petitions that a rehearing be granted for the reasons:

The statutory appellate jurisdiction of this Court is limited to review of orders and judgments from which an appeal is taken.

Donovan v. Esso Shipping Company, 259 F.2d 65, (3rd Cir. 1958)

Carter v. Powell, 104 F.2d 428 (5th Cir. 1939), cert.den. 308 U.S. 611

Gannon v. American Airlines, Inc., 251 F.2d 476 (10th Cir. 1957)

No appeal has ever been taken by the United States from the Order Denying the Government's Motion for a New Trial or from the judgment entered on the jury's verdict.

Accepting, arguendo, that the District Judge might correct—as a mistake—his approval of an unambiguous remittitur, it does not follow that such correction lifts the barrier which the failure of the United States to appeal has raised to any material change in the judgment of February 1, 1965.

Gila respectfully asserts that no amount of correction or change in the Order approving the remittitur can amount to either revocation of the Order Denying a New Trial or to an enlargement of the time for appeal from the judgment of February 1, 1965 and the Order Denying a New Trial with reference to said judgment.

Gila's appeal was from the void judgment of November 18, 1965; that is the only matter with respect to which this Court's jurisdiction has been invoked.

Unless, therefore, it be the law that an appeal from a specific judgment opens the record for a review by a Court of Appeals of all proceedings had in the cause below including a judgment and order denying a new trial with respect thereto which has not been appealed from, this Petition is meritorious.

We respectfully call the Court's attention to the fact that none of the cases relied upon as empowering a District Judge to hold a rehearing and change his decision deal with the jurisdiction of such a judge following a jury trial. Gila specifically points to the fact that Rule 58(b) only permits this in a case tried to the Court.

The Opinion says in effect: (a) Judge Powell made a "mistake" when he approved the remittitur July 15, 1965 which could be corrected under Rule 60(b) 1 within the time allowed for appeal; (b) the Government's Motion for Judgment on the Remittitur constituted such a timely motion, hence Judge Powell could correct his Order of July 15th by, in effect vacating it, and accepting a "satisfactory" remittitur from Gila. The Opinion recognizes that such a proceeding under Rule 60(b) is an "independent" proceeding which does not toll or extend the time for appeal. Yet the Court in effect holds that it provides a procedure which permits the entry of a second judgment from which an appeal can be taken thereby in effect appealing from a trial judgment with respect to which the time for appeal has long since passed. We respectfully assert that this conclusion is unsound.

We respectfully assert that if the Government's "Motion for Judgment on Remittitur" be treated as a motion to correct a mistake under Rule 60(b) these conclusions logically must be reached

(a) The District Judge then knew his order of July 15, 1965 had been rendered by a mistake since Gila was vigorously challenging the right of the District Judge to in effect enter a second judgment thereby correcting the mistaken order of July 15, 1965.

(b) The Government was equally well advised as to the position of Gila.

(c) The Government, instead of urging that the District Judge vacate his order of July 15, 1965 as mistakenly entered, actively urged that this infringement of the constitutional rights of Gila be ignored by ratifying the order of July 15, 1965, through entry of the second judgment.

This the District Judge did.

If in fact the Motion for Judgment Upon Remittitur was an application by the United States to correct the mistaken order

of July 15, 1965, *the United States should have appealed to this Court when the District Judge, in effect, refused to correct this mistake*, then clear to all, but instead ratified it by the entry of the second judgment.

THE BADLEY APPEAL

We respectfully call the Court's attention to the fact the Badleys were parties to the trial (R.T. 117, Entry of Nov. 18, 1964); that the judgments did not run in favor of any named parties and that the purpose of the assignment of the proceeds was a matter of convenience to the parties to simplify handling of the funds. We respectfully assert that this is a matter which should not be adjudicated by this Court since manifestly there has been no hearing on the matter and no "case or controversy" posed. Certainly the District Court did not have a "case or controversy" in the constitutional sense for adjudication and if the District Court had no jurisdiction this Court has none.

Respectfully submitted,

SNELL & WILMER

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is in my judgment well founded and that it is not interposed for delay.

Mark Wilmer







